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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 732

H. J. JENKINS, PETITIONER,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED JANUARY 31, 1941.

CERTIORARI GRANTED MARCH 10, 1941.

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[fol. a] [Caption omitted.]

IN CIRCUIT COURT OF DADE COUNTY, MISSOURI

8959. Damages

H. J. JENKINS, Plaintiff,

vs.

J. M. KURN AND JOHN G. LONSDALE, Trustees of St. L. S. F. R. R. Co., Defendants

MINUTE ENTRY OF HEARING—March 16, 1938

Now on this day comés the parties, Plaintiff and Defendants, by their respective attorneys, and this cause coming on to be heard the said parties announce ready for trial and thereupon issue being joined comes now a jury summoned herein, to-wit:

Phillip Taylor	Joe Grisham
Jess Casey	Chas. Tarrant
Wm. Vanbuskirk	Hugh McConnell
Harold Maxwell	Aughty Jones
J. A. Pidcock	J. C. Hoover
Arthur Gillman	G. S. Stockwell

twelve good and lawful men from the body of Dade County who are duly selected, impaneled and sworn to well and truly try the issues now joined herein and a true verdict of their findings render to the Court in accordance with the [fol. b] evidence but for want of time to conclude the hearing thereof on this day a further hearing is by order of the Court adjourned until tomorrow morning at 9 o'clock, to which time the said jury is duly respited.

IN CIRCUIT COURT OF DADE COUNTY

8959. Damages

Trial resumed

H. J. JENKINS, Plaintiff,

vs.

J. M. KURN AND JOHN G. LONSDALE, Trustees of St. L. S. F. R. R. Co., Defendants

VERDICT AND JUDGMENT—March 17, 1938

Now at this day comes again the said parties, Plaintiff and Defendants, by their respective attorneys, and also

comes again the jury herein impaneled and sworn to try this cause. Whereupon the trial is resumed and progresses in the hearing of the evidence to the conclusion thereof.

And after hearing the evidence, instructions of the Court and argument of counsel in the case, the jury retires to consider its findings and afterwards, on the same day, the said jury having agreed upon a verdict returns into open court and renders to the Court a verdict which said verdict is in the following words: "We the jury find the issues in favor of the plaintiff and assess his damages at the sum of ($12,000.00) Twelve Thousand Dollars.

J. A. Pidcock, foreman.

It is therefore considered, adjudged and ordered by the Court that Plaintiff H. J. Jenkins have and recover of and from the defendants, J. M. Kuhn and John G. Lonsdale, Trustees of the St. Louis and San Francisco Railway Company the sum of Twelve Thousand Dollars as damages aforesaid assessed by the jury, together with all costs in this suit laid out and expended for which execution may issue.

[fol. c] IN CIRCUIT COURT OF DADE COUNTY

[Title omitted]

ORDER GRANTING APPEAL—March 18, 1938

Comes now the Defendants in above cause by attorney and files herein their affidavit praying the Court to grant them an appeal from the judgment rendered against them in above cause and same being seen, heard and fully understood is by the Court sustained and appeal granted to the Supreme Court as prayed for. It is further ordered that defendants be given to and including the first day of next regular term of this Court to file their bill of exceptions in this cause.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1] IN SUPREME COURT OF MISSOURI

No. 36340

September Term, 1939. January Call

H. J. JENKINS, Respondent,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees of St. Louis-San Francisco Railway Company, a Corporation, Appellants

Appeal from the Circuit Court of Dade County, Missouri

Honorable Thomas W. Martin, Judge

Appellants' Abstract of the Record—Filed December 21, 1939

This suit was instituted in the Circuit Court of Newton County, Missouri, on January 7, 1938, by the filing of plaintiff's petition with the clerk of said court. Writ of summons, returnable to the regular February, 1938, Term of said court, was duly issued and served on defendants.

[fol. 2] February 25, 1938, the return day of the writ, defendants filed their answer and an application for change of venue. Thereafter a change of venue was granted and the cause transferred to the Circuit Court of Dade County, Missouri, and the transcript filed with the clerk of the latter court March 16, 1938.

March 14, 1938, defendants filed an amended answer.

March 16, 1938, plaintiff filed his reply, which said petition, amended answer and reply, omitting captions, are, as follows:

PETITION—DAMAGES

Comes now the plaintiff, and for his cause of action alleges and states:

That the defendants are, and were, at all the time hereinafter mentioned, the duly appointed, qualified, and acting Trustees of all of the properties of the St. Louis-San Francisco Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri; that as such Trustees, the defendants are, and were, at all

the times hereinafter mentioned, in charge of running and operating all of the rolling stock, trains, and properties of the St. Louis-San Francisco Railway Company, by virtue of their appointment as such Trustees by the Federal Court at St. Louis, pending the re-organization of said corporation; that the said Trustees are, and were, at all the times [fol. 3] hereinafter mentioned, doing a general interstate business with headquarters at St. Louis, Missouri; that the defendants' line of railroad extends in a southwesterly direction from Kansas City, Missouri, to and through the towns of Olathe, Paola, Ft. Scott, Pittsburg, Kansas, Lamar and Springfield, Missouri, and thence through the State of Arkansas; that a line of the defendants' railroad tracks runs from Wichita to and through the towns of Augusta and Beaumont, Kansas, and thence connects with the main line of the Frisco at Ft. Scott, Kansas; that at Beaumont, there is a line of the defendants' railroad which runs from Beaumont to and through the towns and cities of Winfield, Arkansas City, Kansas, Blackwell and Enid, Oklahoma, and thence to Tulsa, which connects with the main line of the defendants' road which runs from St. Louis, Missouri, through the towns of Springfield, Neosho, and Monett, Missouri, Afton, Tulsa, and Oklahoma City, Oklahoma, and thence south; that at Neosho, Missouri, in Newton County, the defendants maintain a station and station grounds with an agent in charge thereof, wherein service may be had upon the defendants as by law provided.

That on August 1, 1919, the plaintiff was employed as a locomotive fireman, and has been continuously in the employ of the defendants until July 20th, 1937; that prior to the plaintiff's employment as a locomotive fireman by the [fol. 4] Frisco Railroad, he had been, for a great number of years, employed in the same capacity by other railroads.

That on the 20th day of July, 1937, plaintiff was in the employ of the defendants, as a locomotive fireman, with headquarters at Enid, Oklahoma; that on said date the plaintiff, with Howard Reese as engineer, started with an interstate train No. 630 of, approximately 35 cars and two coaches from the town of Enid, Oklahoma, to Beaumont, Kansas, a junction point of the defendants' railroad; that the plaintiff and said engineer had proceeded with said train to Arkansas City, Kansas, and at said point the engineer was handed orders by the dispatcher in charge of the movement of defendants' trains, that a special train No.

1229 had preceded them approximately thirty minutes, and for said engineer to be on the lookout for said train.

That defendants' employees in charge of special train No. 1229 ran from the town of Arkansas City, Kansas, to the town of Winfield, Kansas, the line of defendants' railroad crosses the tracks of the Atchison-Topeka & Santa Fe at approximately right angles, and at this point, the defendants' tracks run in a northerly and southerly direction, and the Santa Fe tracks run in an east and west direction; that the train crew operating the special train No. 1229 arrived on the defendants' tracks a short distance from the Santa Fe tracks and stopped said train, consisting of 25 or 30 box [fol. 5] cars and a caboose; that the employees in charge of said special train abandoned same and left it standing on the main line and cut the engine off and took it across the Santa Fe tracks, to take water at the water tank, located some 200 yards north of the place where the Frisco and Santa Fe tracks intersect; that the employees in control of the defendants' special train negligently and carelessly left said box cars and caboose on the main line track of the defendants' railroad, without taking any precaution to flag any on-coming trains from the south which might be following; that said employees violated Rule 99, which is as follows:

"When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection.

He must at once place one torpedo on the rail on the Engineman's side, and remain until recalled. When recalled he may return after placing a second torpedo on the rail 60 feet from the first one."

That instead of obeying the above rule, the employees of the defendants' railroad abandoned their train, and proceeded north without protecting the caboose and the approaching train No. 630, upon which plaintiff was locomotive fireman.

That the defendants' track, as it approaches the town of Winfield, crosses what is known as Walnut River, and across [fol. 6] which there is a long bridge constructed, which is approximately twenty-five hundred feet from the Santa Fe crossing; that as the defendants' track crosses said bridge,

and approaches the Santa Fe crossing, said track is curved in an S shape, said curve running to the northeast; that on the left hand side, or the side upon which the plaintiff was riding, the view of the Santa Fe crossing from a distance of some six or eight hundred feet to the south thereof, was obstructed by large buildings on the west of said tracks, and a line of trees, which the defendants' agents, servants and employees had allowed to grow along the defendants' right of way, said line of trees and buildings completely cutting off the view of said plaintiff of the position of the caboose and cars which the defendants' agents, servants, and employees had negligently left standing on said Frisco tracks; that the defendants' agents, servants and employees knew, or by the exercise of ordinary care could have known, that the back end of said special train No. 1229, and the cars in front thereof, were obscured from the view of an approaching train coming from the south.

That the engineer, Howard Reese, negligently and carelessly approached said Santa Fe crossing with his engine and train not under proper control; that for some three miles south of the bridge over Walnut River, the track of the defendants' slopes downward, and into the town of Win- [fol. 7] field, Kansas, approaching the crossing over the Santa Fe tracks; that said engineer knew, or by the exercise of ordinary care could have known, that he was approaching the yard limit sign, which was placed to the right of the defendants' track, and in plain view of said engineer; that said yard limit sign was stationed a few hundred feet south of said Walnut bridge, and some two thousand feet from the Santa Fe crossing; that the plaintiff, after said engineer had entered said yard limit of the defendants' track, warned the said Howard Reese, the engineer of train No. 630, upon which the plaintiff was riding, to put on the emergency brake; that said train was proceeding at a too rapid rate of speed, and that the caboose of the special train was just ahead; that said engineer refused to put on the emergency brake, and proceeded at a negligent, careless, and rapid rate of speed toward said caboose, and violated Rule No. 93 which is as follows:

"Within yard limits the main track may be used for protecting against first class trains. Second and third class and extra trains must move within the yard limits prepared to stop unless the main track is seen or known to be clear."

That the plaintiff requested and ordered said engineer to slow his train down, which said engineer failed to do, and proceeded to run his train into the rear of said special train, [fol. 8] caboose, and freight cars, thereby causing a serious rear end collision; that when said train upon which the plaintiff was riding had reached a distance of some two or three car lengths south of the rear of said special train, the plaintiff in his dilemma, was forced to jump from said train in order to avoid being killed, and in so doing, the plaintiff received the following serious and permanent injuries:

That all of the bones in his right foot, ankle and leg were broken, fractured, twisted, and sprained; that the muscles, ligaments, tendons, nerves, tissues, and fibers of his right foot and leg were bruised, cut, lacerated, twisted, torn, and injured; that the bones in his right shoulder and arm, and the right clavicle were broken, fractured, twisted, and sprained; that the ligaments, tendons, nerves, tissues, and fibers of his right arm and shoulder were bruised, cut, lacerated, twisted, torn, and injured; that his back, hips, and spine, and the bones and bony structures thereof were crushed, fractured, and impaired; that the muscles, ligaments, tendons, and nerves of his entire back, spine, hips, and hip joints were injured and impaired; that the sacro-iliac region of the plaintiff's back was injured and impaired, and the muscles and nerves thereof were ruptured, and torn; that his entire nervous system was shocked and impaired, so that he is unable to sleep, and that his right shoulder, arm, back, right leg, ankle and foot are drawn, [fol. 9] twisted, and stiffened, and the plaintiff is unable to use them in the ordinary functioning of his body.

That he was injured internally, and that the vital organs of his body, to-wit, his heart, kidneys, liver, bladder, and intestines were injured and impaired, and that they cause him intense pain, and fail to properly function.

That at the time of receiving his injuries he was a strong and able bodied man, earning large sums of money per month, approximately two hundred fifty ($250.00) dollars per month, and was in line for promotion and higher wages, with a long expectancy; that the plaintiff was of the age of 47 years, and that he has lost all of his earnings to the present; that his injuries are permanent in their nature, character, and extent, and he will lose all of his earnings in the future, as his earning capacity is totally and completely destroyed.

Plaintiff states that he became sick and sore, and has suffered and still suffers, great pain and anguish of mind and body; that the defendants' agents, servants, and employees have furnished the plaintiff some hospital and medical care, but plaintiff will in the future, and will for a long period of time, require medical aid and care, which will, of necessity, require the expenditure of large sums of money; that by reason of the aforesaid injuries, the plaintiff has suffered great pain and anguish of mind and body, and will, in the future, endure great pain and anguish of [fol. 10] mind and body as long as he lives; that all of the plaintiff's injuries are permanent in their nature, character, and extent, and have disabled the plaintiff, and made him a permanent cripple.

That the plaintiff, by reason of the promotion and retirement of his fellow employees, by recent legislation enacting the pension laws for the firemen and engineers, and the Brotherhood, of which this plaintiff was a member, the plaintiff could have been promoted to higher wages and better employment, if it had not been for the negligence and carelessness of the defendants, as herein alleged.

That the plaintiff, at the time he received the aforesaid injuries, was employed as a fireman, and was assisting in taking an interstate train from the State of Oklahoma to the State of Kansas, and was employed in interstate transportation, along with the defendants' agents, servants and employees; that the relations between the plaintiff and the defendants are, and were, governed by the Federal Employers Liability Act, passed by the Federal Congress, together with all amendments thereto.

Plaintiff states that his injuries, as aforesaid, were directly caused in whole or in part by reason of the negligence of the defendants, their agents, servants, and employees in the following manner and particulars, to-wit:

[fol. 11] (a) In that the agents, servants, and employees of the defendants in charge of special train No. 1229, running ahead of the train upon which plaintiff was employed, were negligent in cutting off the engine from said train, and proceeding across the tracks to the water tank, and thereby abandoning their train, which was left standing on the main line track, when they knew, or by the exercise of ordinary care on their part could have known, that other trains were likely to follow and collide therewith.

(b) In that the agents, servants and employees of the defendants in charge of said special train were guilty of negligence in violating Rule No. 99, of the Book of Rules governing the transportation department, then in force, in that they abandoned said train on the main line track without having a flagman, with stop signals, to immediately go back a sufficient distance to insure full protection, when they knew, or by the exercise of ordinary care could have known, that said train would be overtaken by another train.

(c) In that the engineer in charge of train No. 630, upon which plaintiff was riding, was negligent in that he failed to keep a constant lookout for a special train, which he knew was ahead of him, and failed to have his train under control.

(d) In that said engineer in charge of said train No. 630 was further negligent in that after he was notified by plain-
[fol. 12] tiff that the extra was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced plaintiff to jump from said train in order to save his life, or some bodily harm.

(e) That said engineer of said train No. 630 was further negligent in that he failed to have said train under control, as he was running in the yard limits at Winfield, Kansas, in violation of Rule No. 93, requiring, under such circumstances, for the said engineer to have said train under control, so as to be able to make an emergency stop when necessary.

That by reason of all of said acts of negligence acting separately and conjointly, plaintiff was injured as aforesaid, to his damage in the sum of sixty-two thousand ($62,000.00) dollars.

Wherefore, plaintiff prays judgment against the defendants in the sum of sixty-two thousand dollars ($62,000.00), and for his costs laid out and expended herein.

W. B. Myres, C. E. Reed, F. P. Sizer, Attorneys for Plaintiff.

[fol. 13] AMENDED ANSWER

Come now defendants and for their amended answer to plaintiff's petition, admit that on July 20, 1937, within the

yard limits of defendants' track at Winfield, Kansas, a freight train, of which plaintiff was the locomotive fireman, collided with another of defendants' freight trains.

Admit that at the time of said collision, plaintiff was in the employ of defendants as a locomotive fireman and was, at that time, engaged, along with defendants, in interstate transportation.

Defendants deny each and every other allegation in plaintiff's petition contained, and having fully answered, pray to be discharged with their costs.

Further answering, defendants allege:

That on July 20, 1937, one of its freight trains, known as train number 630, a second-class train, then proceeding in a general easterly direction and approaching the station of Winfield, Kansas, of which train plaintiff was the locomotive fireman, collided with another of the defendants' trains, being known as freight train number Extra 1229, which then was, and for some time had been, standing still, within the limits of the defendants' yards or tracks in the town of Winfield, Kansas, or within what is commonly known as the yard limits.

[fol. 14] That, at the time of said collision and for many years prior thereto, with the full knowledge of plaintiff, there was, and had been, in effect a rule of the defendants, commonly known as Rule Number 93, which provided as follows:

"Within yard limits the main line track may be used for protecting against first-class trains. Second and third-class and extra trains must move within the yard limits prepared to stop unless the main track is seen or known to be clear."

That, at the time of said collision, freight train Extra 1229 was standing within the yard limits of the town of Winfield, Kansas, as such yard limits are described and defined in said Rule Number 93, and where said train, under the rules and customs of the defendants then in force, had a right to be and remain.

That by reason of train orders previously issued by defendants to the members of the train crew, including plaintiff, of said train number 630, plaintiff knew, or by the exercise of ordinary care should have known, as his said train approached the town of Winfield and defendants' yard

limits thereof, that said train, Extra 1229, was running ahead of and in the same direction as his said train and not far in point of time in advance thereof; that plaintiff was an experienced locomotive fireman and was well acquainted with defendants' track and with the location of the town and [fol. 15] station of Winfield and the location of the yard limits and boundaries of the yard limits and that the same were marked by what is termed a yard limit board or sign and under the rules and customs of the defendants governing conduct and work of locomotive firemen, including said Rule 93, all of which rules and customs were well known to plaintiff, it was plaintiff's positive duty, as his said train approached the yard limits of Winfield and after entering the same, to be on the lookout for and protect himself and his said train against any other trains or cars that might be standing upon the main line track within the yard limits of Winfield, and upon seeing or otherwise discovering the presence of said train of cars, so standing within said yard limits, to warn and notify the engineer of his said train thereof; that it was the further duty of the plaintiff to see that his said train approached and entered said yard limits under control, prepared to stop and so that it could be stopped upon discovering another train or cars standing upon the main line track within said yard limits.

That as said train number 630 approached the point of collision with said train number Extra 1229, and when yet a sufficient distance from said train to have enabled the engineer of train number 630 thereafter to have stopped the same before colliding with train number Extra 1229, the plaintiff saw, or, by the exercise of ordinary care, could [fol. 16] have seen, said train Extra Number 1229, standing upon defendants' track, as aforesaid, and that he either negligently failed to see said train, or if he saw the same, he negligently failed to timely notify the engineer of the presence of said train.

That if, as plaintiff alleges and defendants deny, said train number 630 approached the yard limits of Winfield and the point of collision at an excessive rate of speed, which would not enable or permit the stopping of said train number 630 before colliding with train Extra 1229 and after the same could have been seen by plaintiff, then plaintiff negligently failed and omitted to warn or notify the engineer of such alleged excessive speed and negligently failed to

take any other means or precautions then at his hand to reduce or cause to be reduced the speed of said train.

That said acts and omissions of the plaintiff, acting separately or concurrently, directly contributed to cause the collision between said trains and such injuries, if any, as plaintiff received because of such collision or impending collision.

Further answering and for a separate defense, defendants allege that by reason of plaintiff's violation of the rules and customs of the defendants, including Rule 93, as more particularly hereinabove set forth, plaintiff is not entitled to recover in this action.

Further answering and for a separate defense, defendants allege that by reason of the facts, as hereinabove alleged, [fol. 17] plaintiff assumed the risks and dangers incident to or flowing from said collision or impending collision, all of which said risks and dangers were readily observable and were known to and appreciated by him or were such as would have been fully known to and appreciated by the ordinarily prudent person in his position and, for that reason, plaintiff is not entitled to recover in this action.

Wherefore, having fully answered, defendants pray to be discharged with their costs.

Mann, Mann & Miller, Attorneys for Defendants.

REPLY

Comes now the plaintiff and denies all new matters set up in defendants' amended answer, and asks judgment as prayed for in his petition.

Further replying, plaintiff specifically denies that he was guilty of any contributory negligence, as set up in defendants' amended answer.

Plaintiff further replying, specifically denies that he assumed the risk as alleged in defendants' amended answer, because plaintiff had no control over the engineer, and did not know and appreciate the risks incident to the negligence of the conductor, engineer or other employees in time to avoid being injured, and having fully replied, asks judgment as prayed for in the petition.

C. E. Reed, Wm. B. Myres, F. P. Sizer, Attorneys for Plaintiff.

[fol. 18] The following proceedings were thereafter had in said cause in the Circuit Court of Dade County, Missouri, at the regular March, 1938, Term:

Trial

March 16th, trial begun before said court and a jury.

Verdict

March 17th, upon the conclusion of the trial, the jury returned into open court, the following verdict:

"We, the jury, find the issues for the plaintiff and assess his damages at the sum of $12,000.00, twelve thousand dollars.

J. A. Pidcock, Foreman."

Judgment

Judgment was, on said date, entered in accordance with said verdict.

Motion for New Trial

March 17th, defendants filed their motion for new trial.

Motion for New Trial Overruled

March 18th, defendants' motion for new trial was, by the court overruled.

Affidavit for Appeal

March 18th, defendants' affidavit for appeal filed and defendants granted an appeal to the Supreme Court of Missouri, and an order entered extending the time for filing bill of exceptions until on or before the first day of the next regular term of said court.

Bill of Exceptions Filed

Thereafter, and on the 1st day of November, 1939, within the time heretofore allowed by the court, defendants presented their bill of exceptions, which was, on said date, [fol. 19] signed by the Judge of said court, ordered filed and was filed by the clerk of said court, and made a part of the record in said cause, on the 3rd day of November, 1939.

All of the foregoing being duly shown by the records of said court.

Bill of Exceptions

H. J. JENKINS, plaintiff, testified as follows:

Direct examination.

By Mr. Myres:

I live in Enid, Oklahoma. My first railroading was with the Seaboard Airlines, Central, of Georgia. I worked for the Seaboard a couple of years at Central, Georgia; I first went to the hosteler, helping, and then went out firing on the road. I have worked for the Frisco since August 1, 1919, as locomotive fireman. During the month of July, 1937, I was working north out of Enid. I run from Enid, Oklahoma, to Beaumont, Kansas, through Blackwell, Arkansas City and Winfield, Atlanta, Latham—those are the main towns, there are some other little flag stations. The general direction of the tracks from Enid to Beaumont is principally north and south.

On the day this accident happened, I was on train 630. It was a second class train, and they pulled a mixed train, they call it; we pulled passengers on there, had a baggage coach and passenger coach on it. That day the crew consisted of [fol. 20] two brakemen, the conductor, the engineer and fireman. Howard Reece was engineer. I was the fireman. Felton was head brakeman. Kelly was the conductor. It was a time-card train. We were making our scheduled stops that day.

Q. Now when did you first know, Mr. Jenkins, that there was a special train ahead of your train?

A. When we left—ready to leave Arkansas City, we got an order there, extra 1229 run ahead of us from Arkansas City to Beaumont.

Q. Who was in charge of your train that day?

A. The engineer and the conductor.

Q. Now did you see train 1229 at any time before this collision?

A. No, sir, I didn't.

Q. Had it left Arkansas City before you left or was it there while you were there?

A. No, sir, I didn't see it.

Q. Now, who carries the orders in regard to the number of trains?

A. The engineer and the conductor.

Q. Did they carry the orders on this day?

A. Yes, sir, they had the orders.

Q. Now, how many coaches did you have on your train, Mr. Jenkins?

A. We had two.

I don't know whether there was any passengers on our train that day or not, I wouldn't say. Mr. Patterson, a road master, was on this train 630 that day.

Q. Now, how many box cars did you have on this train?

A. I think Mr. Kelly said, I don't think he would be mis- [fol. 21] taken, he had about thirty-four, between thirty-four or thirty-five, something like that.

Q. In addition to the two coaches you have already testified?

A. Well, I wouldn't say it was in addition to that, but he said we had thirty-four, thirty-five cars.

Q. Now what type of engine did you have?

A. We had a 1200.

Q. Now, who was acting as engineer on that day you made this run?

A. Mr. Reece.

Q. Did he run that engine that day?

A. Yes, sir.

Q. Did anybody else ever run it while you were on that trip up to the time of the accident?

A. No, sir.

Q. Now, who has control of the engine under the rules of your company while you are on a run?

A. The engineer.

Q. And who did you take your orders from when you are on a run and on duty, working for the defendants?

A. They give them to the engineer and then he reads—lets us read them.

Q. Now if there is a question—not a question of order but a question of management of the train, or any duty for you to perform, regardless of what they are, who do you take your orders from?

A. From the engineer.

Q. And you are under the engineer's——

A. (Interrupting:) Yes, sir, I am under his jurisdiction. [fol. 22] Q. Now then, when the fireman is sitting on his box and the engineer is sitting on his usual place, where is the engine operated from, Mr. Jenkins?

A. From the right-hand side on the engineer's side.

Q. Now where is the brake valve?

A. On the right hand side, engineer's side.

Q. And how close is that to you?

A. Well, he is on one side of the engine and I am on the other, pretty good distance across there.

Q. Now while you are on the road, as you were this day when this accident happened, did you have any control at all over the engine?

A. Not a bit.

Q. You are familiar with the rules of the company, are you permitted under the rules of the company to take charge of the engine until you are ordered to by one of your superiors?

A. Not a bit.

Q. Now, I will have you state, Mr. Jenkins, with reference to the Santa Fe crossing now and the Walnut River Bridge, where is that located in the City of Winfield, Kansas?

A. Well, as we approach coming from the—going north—it is located, going south, as we call it, but when we are going on to this bridge—I mean coming from the south going north it is south of Winfield.

Q. Now which direction were you traveling this day?

A. They was going north, as we call it.

Q. And what time of day was it?

[fol. 23] A. When we got to this Winfield—or back to this place?

Q. Yes.

A. Oh, I reckon it was along in the day, seven o'clock, something like that, as well as I recollect now, I didn't look——

Court (interrupting): In the afternoon?

A. Yes, sir.

Mr. Myres:

Q. Now, was it daylight?

A. Yes, sir.

Q. You could see, could you?

A. Yes, sir.

Q. Now which direction from Walnut River Bridge, will you tell the jury the direction that the track runs after it leaves the Walnut River Bridge?

A. Well, coming off of this Walnut River Bridge it is

kind of an "S"—it kind of turns to the northeast, as I explain it—and then it comes on down straight, and then it turns back north down here on a curve; it gets back kind of north.

Mr. Mann:

Q. Now the first curve—which direction does the first curve—which does it take, to the left or right, as you approach Winfield?

A. Well, after you get off—when it is on that bridge there it is kind of a curve on that bridge, don't you see? The bridge kind of curves a little bit, but after you get off the bridge the track goes straight, then, kind of northeast, you might say.

Court: Does either side expect to use any plat in showing this road curve?

Mr. Myres: We have none, Your Honor.

Mr. Mann: We are expecting to use one; I have no objection to introducing it now.

[fol. 24] Court: I think we could save time.

Mr. Mann: In producing it now, I want this understood; there are certain landmarks on it that couldn't be put there at the time it was made up; I didn't have the information, and I expect to put them on by a witness who is here this morning, but I have the track; I haven't those trees located.

Mr. Myres: Your Honor, if he is going to change it——

Mr. Mann: Oh, I am not going to change anything on there.

Mr. Myres: I understand, but I mean you are going to put some trees which are going to be in controversy in this case.

Court: What I am particularly anxious about, if there is a curve in that railroad, the jury gets a good idea of the curve if you have got it in the plat; then you can prove your distances; they can see on the plat which way it curves; when it starts curving and when it quits curving; and if you don't want to show it for any other purpose at this time, Mr. Myres, just show it to the jury for the purpose of letting the jury see the curve.

Mr. Mann: Well, if you are going to put it in evidence——

Mr. Myres: I am not putting it in evidence.

Mr. Mann: If he is going to use it, I want him to identify it and use and offer it in evidence.

Mr. Myres: We have a right to say what we want to offer in evidence.

[fol. 25] Mr. Mann: Just a minute, I don't see how it can be used before the jury unless it is offered in evidence.

Court: Well, it can't be used unless you folks agree that it is a fair representation of everything that shows on there.

Mr. Myres: I will agree, Your Honor, it is a fair representation of the track and curve.

Court: Well, then, at this time, they are only offering that portion of it that pertains to the track and curve.

Said Exhibit "A" is attached to the last page of this abstract of the record.

Mr. Myres: Yes, sir.

Court: Gentlemen of the jury, you understand the plat is not now offered in evidence for any purpose except to enlighten the jury as to the track and curve, at that point.

Mr. Myres: "Plaintiff's Exhibit A." I want to identify the directions here. Now——

Mr. Mann (interrupting): We can agree that this arrow is pointing north and that the other is made in reference to it.

Mr. Myres: Yes.

Court: Well, gentlemen, you just tell the jury which way this runs.

Mr. Mann: I think we can agree on this—that the lines running up and down to the extreme right of the plat are the Santa Fe tracks; the town of Winfield is off to the right [fol. 26] of this plat; the town of Arkansas City is to the left, and not shown by the plat; the mark MP 501, which is a mile post, is right at the intersection of the Frisco track and the Santa Fe track; this is the Frisco track here.

Mr. Sizer: But this crossing is where the cars were stopped, Mr. Mann.

Mr. Mann: That is the crossing of the Santa Fe and Frisco tracks; now in the extreme left of this picture is what has been referred to in the opening statements as the Walnut River Bridge.

Mr. Sizer: And 630 came in from this direction:

Mr. Mann: Came in from our left, looking at it, and toward our right; and what has been referred to as the yard limit board here is shown by the marker "Yard Limit," and if we can agree—it is not marked on here, but here is a point marked MP 501 7 poles, which is approxi-

mately where the accident occurred; I don't know whether you can agree to that or not.

Mr. Sizer: As we at different times let the witnesses indicate on the plat where they think it occurred.

Mr. Mann: Now about the center of the plat and under the direction marker is a structure and mark "Electric light plant"—now that, I understand to be the location of the electric light plant, and over where it is marked with a large circle is the race track. Now I don't think there will be any dispute about those structures.

[fol. 27] Court: Now, you examine the witness any way you want to about that curve.

Mr. Myres: Now, looking, Mr. Jenkins, at Plaintiff's "Exhibit A" which direction now were you going at the time this accident happened with your train 630?

A. Well, where I first saw the caboose?

Q. No, which direction were you going?

A. When we came off the Walnut River Bridge there we was going northeast.

Q. Now does this "Exhibit A"—does that show a curve in the track there about where the Walnut River Bridge is and down toward the light plant, is there such a curve in the track there?

A. After you leave the yard limit board there, after you get along this bridge down between the yard limit board, it is straight track down there.

Q. Yes. Now does this picture show the track is straight there for some distance, is that approximately the way it is there?

A. It goes straight northeast.

Q. Northeast. Now does this show this curve on the track which goes down to the Santa Fe track?

A. This curves down here back north.

Court: Like it shows on the plat?

A. Yes.

Court: And this one, when you go off the Walnut River Bridge, shows like it is in the plat?

A. From the Walnut River Bridge on down there it is [fol. 28] straight, then when you get on down to this curve it goes back straight north, goes down to the Santa Fe crossing.

Mr. Myres:

Q. Now as you come off this bridge here, this Walnut River Bridge, as you come off that bridge, what buildings, if any, are there on your left as you come off the bridge?

A. Light plant.

Q. How big a building is that there?

A. Oh, it is a big building; then they got up a lot of other stuff in the road there besides that.

Q. Any trees there besides the building?

A. Trees all along there.

Q. Now is it possible, as you come off the Walnut River Bridge, is it possible for you to see down here, trains stopped down here south of the Santa Fe crossing?

A. I never did see one there; I would have to be looking cross country there to see a train down that way.

Q. Just answer my question. Is it possible for you to look, physically, from your place and see a train, as you come down here toward these buildings? You can't see anything there on account of—or can you see a train there?

A. No, sir, I can't see no train there.

Q. Now as you come around the curve what effect does coming around the curve have on you seeing across there as you come around the curve?

A. You mean this curve here?

Q. No, the curve off the Walnut River Bridge?

A. Oh, that light plant breaks the view there.

[fol. 29] Q. What, if anything, does the engine do, in the way of cutting off your view?

A. As it comes off the curve there it makes the turn northeast.

Q. Now from the light plant and the buildings there, what, if anything, from there on down here and around this curve, what is there there on the left hand side of the railroad track and on the railroad track?

A. Trees, bushes and weeds, and everything else, there, in the summer time, all over, you can't see anything around there at that time of the year.

Q. Is there any place you can see, Mr. Jenkins, by even looking off this direction, off through the fields, as you say, is there any time you can constantly see a train progressing south of the Santa Fe tracks?

A. Not as I know of; I never did look across country and never been along there when there was a train there before.

Q. Now are there any openings from the time you come off the Walnut River Bridge, are there any openings, Mr. Jenkins, whereby you can see constantly as has been stated here, a train progressing south from the Santa Fe tracks?

A. No, sir, I didn't see no trains there.

Q. Well, could you have seen it, if you had been looking across field?

Mr. Mann: We object to that, invades the province of the jury, if the court please.

Court: Well, he is trying to change your question; is [fol. 30] there anything to obstruct your view?

Mr. Myres:

Q. Is there anything from the time you come past the light plant here, is there anything to obstruct your view across field here now?

A. Trees and weeds and bushes, all growed up along there.

Q. What kind of land is that down there?

A. That is bottom land, rich bottom land, on that Walnut River bottom there.

Q. Where were those trees and bushes located, Mr. Jenkins?

A. All along the right-of-way there.

Q. Part of them on the right-of-way?

A. Well, I don't know, it looked like they was on the right-of-way, I don't know how far they go.

Mr. Mann: We object to that, and ask that it be stricken out.

Court: The objection to that answer as to whether it looked like they were on the right-of-way is not in answer to the question; if you know whether or not it was on the right-of-way, answer; if you don't know, just say you don't know.

Mr. Myres:

Q. From the best of your recollection, what do you say there, and what were the conditions of those trees there on July 20, 1937?

A. Well, they was all in leaves and thick and weeds and bushes and everything else along there, growed up along down there.

[fol. 31] Q. Now from what point did they extend from to what point—now just give the jury an idea where they were.

A. Well, they extended clean on down here to about where this track curves.

Q. Now tell the jury where this train was at the time this accident happened.

Court: Show them on the plat.

A. This——

Mr. Myres: Train 1229?

A. Ahead of us?

Mr. Myres: Yes.

A. Well, from this curve here where I first saw it along up here at this curve, after I got above those trees, where I could see around those trees there, it was about ten or fifteen car lengths down to the caboose; I couldn't see it until I got up here to this curve; the trees broke the view off until I got around here where I could see it.

Q. Where was the train progressing now, after you did see it, where was it progressing?

A. Between the Santa Fe crossing and where I first saw it up here.

Court: The jury would like to have you put your finger about where.

Mr. Myres: Take this pencil and point about where.

A. This the Santa Fe crossing?

Mr. Myres: Yes.

[fol. 32] A. Well, the train was on this side of the Santa Fe crossing there.

Q. This side? (Indicating.)

A. Yes.

Q. How far did it extend down here, will you point to the jury where the caboose was?

A. Well, I don't know, I don't know how far it extended down here; I don't know how many cars they had in that train down here where the caboose was. See, I was coming in behind.

Q. From the time your engine straightened out on this straight-of-way track until it started to curve going into

the Santa Fe crossing, could you see the caboose, looking straight down the track, at any time?

A. No, sir, I couldn't see the caboose looking straight down the track at any time.

Q. Now could the engineer see it any time after the engine straightened out and started down this way, was there any time the engineer could see the caboose?

A. No.

Q. Now, Mr. Jenkins, with reference to the row of trees which you have testified to, where was the caboose placed or left with reference to that row of trees as you came down that straight-of-way?

A. Well, it was about ten or fifteen cars from these trees here down to it, to where I first saw it, to the caboose, the best I could judge of it, going down in there.

(Mr. Myres exhibits Book of Rules to Mr. Mann.)

[fol. 33] Mr. Mann: I have no objection to them.

Court: Wait a minute, if there is no objection to them, it is agreed by counsel on both sides that the rules now being read to the jury were in force at the time of this accident?

Mr. Mann: Yes.

Court: All right.

Mr. Mann: Those two—now I don't know what others—let me see what else you have in mind. No, I have no objection to those three rules.

Mr. Myres: We now offer in evidence Rule Number 1181, 1182 and 1195, shown on pages 120 and 122 of the Book of Rules governing the transportation department of the Frisco railroad and it is stipulated such rules were in full force and effect at the time of the accident.

Court: Read the rules to the jury.

Mr. Myres:

OFFER IN EVIDENCE

1181. The engineman is in charge of the engine while on the road and is responsible for its proper handling and care.

1182. Enginemen while on the road are under the direction of the train conductor, whose orders they will obey unless his orders may endanger the safety of the engine or train or require the violation of rules, in which event the engineman becomes equally responsible with the conductor.

1195. Enginemen must not permit their fireman to handle engine except under their direct supervision, the engine-[fol. 34] man being entirely responsible for the movement.

Mr. Myres:

Q. Now, as you came over the Walnut River Bridge, where were you seated?

A. On the left hand side where the fireman's seat box is.

Q. What were you doing?

A. I had my injector on, filled it up full of water.

Q. Where was the engineer?

A. He was on the right hand side.

Q. Now, about how fast were you going as you come over this bridge and down to this Santa Fe crossing?

A. Well, when we first hit this bridge here he made an application with his air coming across that bridge, and slowed down right direct, I reckon, to five or six miles an hour, might have been a little slower.

Q. Then what did he do?

A. We came on across the bridge and when we got to the bridge there he released it and went drifting on around down there with the air released.

Q. Now, what were you doing after you got your boiler filled with water, what were you doing?

A. I never did get the boiler filled with water.

Q. Where were you looking during the time you came around there before you got down to the buildings there on your left, what were you doing?

A. I was looking down ahead there on down the track.

Q. Now, is the track straight after you come off the Wal-[fol. 35] nut River Bridge and into the yard limits?

A. After you get off the Walnut River Bridge there, it gets straight on down to the—to where that curve is.

Q. Now, did you see anything on the track?

A. No, I didn't see anything along there.

Q. Now, when you come to this curve where the caboose was, which way does that run now, to your left or your right?

A. Well, that comes back around left and gets kind of north—straight north.

Q. Can the engineer see down the track when it starts to curve toward the Santa Fe crossing?

A. No, sir, he can't see from his side there.

Q. What were you doing at that time?

A. Well, when I came around there and got away from those trees where I could see around that curve there, I saw that caboose standing there.

Q. What did you do?

A. I hollered to him to push that brake valve over in emergency, that the train was down there in front of us.

Court: Hollered at who?

A. Hollered at the engineer.

Mr. Myres:

Q. Now, what is that known in railroading, when you yell to the engineer to pull your brake valves over, what is that known as, what is the common term of it?

A. It is known as danger, to stop.

Q. How loud did you yell that to him?

[fol. 36] A. Well, I yelled loud yell.

Q. Did he hear you?

A. Well, he looked around.

Q. And what did he do?

A. Well, he didn't do nothing; he looked like he thought I was joking with him or something.

Mr. Mann: We object to that, if the court please, and ask that it be stricken out, and ask the jury to disregard it.

Court: Wait a minute, gentlemen, the statement of the witness as to "looking like he was joking" would be a mere conclusion, and is not the statement of any fact that the jury may take into consideration as evidence; he can describe what the engineer did, but not give his conclusions as to what he thought about it.

Mr. Myres:

Q. Did he look at you?

A. Yes, sir, he turned around and looked at me.

Q. And did he throw on the brake valve then?

A. No, sir.

Q. Did he make any effort to?

A. No, sir, didn't make any effort to.

Q. What did you do after you yelled to him?

A. I got around off my seat box and went on his side; we were drifting on down there behind that caboose, I was kind of waiting on him to see what he was going to do.

Q. Did you walk over to his side?

A. I got down and walked over to his side.

[fol. 37] Q. How close were you to him?

A. I was right to him.

Court: For the information of the jury, tell the jury how far—how many feet it is from where you sit to where the engineer sat?

A. I don't know how many feet it is across there; I never did measure one of them engines, I don't know how many feet it is; I imagine five or six feet over there.

Mr. Myres:

Q. Now, is there a gangway around the boiler box that you have to walk around when you walked over there?

A. Yes, sir.

Q. Now, you say you were ten or fifteen cars—how long is a boxcar, usually, what will they average?

A. Well, I don't know, I suppose, I never did measure one, they say they are about forty feet.

Q. And now from the time you yelled, how far did you travel until the engineer did put on the brake valve?

A. Well, we was about, when I got down, when we had traveled down the distance within two or three cars, the best I can judge, we got in about two or three cars of the caboose, and I started—I went around in the gangway behind him, and started down on the steps, and he pulled the brake valve over in emergency and I went on down the steps and jumped off and tried to jump across these rock-, and they was so far across there I couldn't get across, and [fol. 38] I hit down in them; I had on a pair of slippers and that foot went down in between some of them, and that gave me a turn that way and I hit my shoulder and busted my head up in here, the hide all off of it.

Q. Tell me how many car lengths you traveled from the time you gave the signal to throw the brake valve in until you jumped, until the engineer did put on the brake valve?

A. Well, I judge that was ten or fifteen cars from where I saw it there to the caboose, looked to me like it was about two or three cars down to the caboose when I jumped off.

Q. And that would be the distance between——

A. That would be the distance.

Q. Yes. Now, from the speed you were going, Mr. Jenkins, at the time that the accident happened, and imme-

diately preceding it, could the train have been stopped if the brake valve had been put in an emergency at the time you first yelled, before it hit the caboose?

A. Yes, I think so; I think it could.

Q. Now, how soon after you saw these cars, Mr. Jenkins, was it, until you yelled "Pull over the brake valve?"

A. Well, I hollered to him as soon as I saw those cars, I saw the cars—well, it was cars, it was the caboose I first saw.

Q. Is that the end of the freight train?

A. That is the end of the freight train.

Q. What was the first thing you saw of that freight train [fol. 39] ahead of you?

A. The caboose.

Q. Was it the back end of it—did it just come into view gradually, or did you see it at all times?

A. No, it kind of come in view gradually; you could see pretty much of it all at one time, though, on my side, especially.

Q. What was the condition of the track and road bed there where you jumped, Mr. Jenkins?

A. Well, it is built up in that river bottom, they call it riprapped, to keep that river from washing away, with these big boulders; I think they get them out of these lead mines, they say they come out of those lead mines, and that is what they haul in there and riprap those back with.

Q. How far does that riprapping you have described extend down from the engine where you had to jump?

A. Well, I suppose, it looked like, to the best of my knowledge, it extended over there ten or twelve, probably fifteen feet, maybe more than that.

Q. Now was this train running at the time you jumped?

A. Yes, sir.

Q. Now what happened to you, Mr. Jenkins? Just tell the jury.

A. Well, when I jumped I hit on that foot first and went down in these boulders, and it gave me a turn just that way, and I hit that shoulder and busted that, and busted my head, and I didn't bust the skull, I busted all the hide off of it, and I rolled down to the edge of them.

Q. Were you able to get up?

[fol. 40] A. No, I couldn't get up. I laid there, I reckon, a few minutes, and some people came along, I don't know where they came from.

Q. Who was the first person you saw?

A. Well, these people drove up in an automobile.

Q. Did you see any member of the train crew?

A. No, I didn't see any member of the train crew.

Q. Now were you taken from where you fell there?

A. Well, those boys got hold of me and about that time an ambulance drove up, and they got hold of me, put me in the ambulance and taken me up to the hospital, and taken me out and put me in there on a table and those nurses——

Q. (interrupting). Were you able to walk?

A. No, sir, I couldn't walk.

Q. Were you suffering any then?

A. Yes. I was mighty near dead.

Court: Well, he asked you about your suffering.

Mr. Myres:

Q. Where were you hurt?

A. My leg and foot, leg and arm, shoulders and head; I was just bloody as a hog.

Q. Now how long did you stay in the hospital there in Winfield?

A. I stayed in there—I went in there that Tuesday evening, and I suppose stayed in there that night and on Wednesday evening until four o'clock, they taken me out of there.

Q. Now where did they take you to?

A. Down to Enid, Oklahoma.

[fol. 41] Q. How did they take you over there?

A. Taken me over there in an ambulance.

Q. Just state what was done there for you in Winfield, first. What did the doctor do there for you?

A. I was going to tell you awhile ago. When I first got there the doctor wasn't there, and those nurses tried to pull my clothes and underwear off of me, and I couldn't stand, and I told them to get some scissors and cut it off of me. I had some summer underwear with long sleeves.

Q. Did they rip your underwear off or cut it off?

A. Yes, sir, they ripped it off.

Q. Were you hurting then at that time, Mr. Jenkins?

A. Yes, I was hurt.

Q. Anything bothering you? Now how far is is from Winfield over to Enid?

A. Well, they taken me over the highway, I suppose, seventy-five, eighty miles, maybe further than that, I don't know exact distance, might have been a hundred miles.

Q. Where did they take you when they got you in Enid?

A. Dr. Mayberry, the division surgeon of the Frisco.

Q. What did he do for you, Mr. Jenkins?

A. They put a cast on my leg, and put my arm in a sling, my ankle and leg, and cast it up, and put my arm in a sling.

Q. Were you able to move your arm after this cast was put on it?

A. No, sir, I couldn't move it.

[fol. 42] Q. Were you able to move your leg?

A. I could move my leg, but I couldn't move my arm.

Q. How long did you stay there in the hospital?

A. I stayed there until that Sunday evening, and——

Mr. Myres (interrupting): How many days was it?

A. Well, I went in there on Wednesday and stayed there on Thursday and Friday and Saturday and left there at three-twenty on number 10 Sunday evening, sent me over to Tulsa, where I changed trains there at Tulsa.

Q. Where were you going then, Mr. Jenkins?

A. I went from Enid to St. Louis.

Q. Who ordered you to go to St. Louis?

A. Dr. Mayberry is all the information I got.

Q. Now when you got in Tulsa, what did they do with you there when you started to St. Louis?

A. They unloaded me and set me there on the gangway until that number ten got in there out of Oklahoma City.

Q. Then w-ere did they put you?

A. Put me in a baggage car, back on the fish rack there.

Q. State what happened to you—did you suffer any from Tulsa to St. Louis, and state what caused it. Just how you did suffer.

A. Well, they put me back in there on that fish car, I was suffering just about as much as a man could, and I was laying back in there, hot weather.

Q. Now while you were on this trip, what was it, if you [fol. 43] did suffer, what caused you to suffer while you were in this box car?

A. Well, the pains—pains all in my back and my arm and my leg and laying there with a cast around my leg, and my arm in a sling, laying there on a cot.

Q. Now were you able to move your hands or your legs?

A. I couldn't move my right hand, I used this left one.

Q. Now was there anybody sent with you to take care of you in the car from the time you left Tulsa?

A. Well, they sent a fireman up there, but he went over there and went to sleep or went somewhere, I didn't see him, I don't think, but once or twice, he crawled up there and went to sleep in the car there on some baggage.

Q. Now after you got to St. Louis, where did they take you?

A. Taken me off at Tower Grove.

Q. How did they take you to the hospital when you got in St. Louis?

A. They taken me over there in an ambulance.

Q. How long were you in the hospital there in St. Louis?

A. I think it was somewhere in the neighborhood of about ten weeks, something like that.

Q. When you got in St. Louis, what did they first do with your arm and shoulder, Mr. Jenkins?

A. They taken my arm out of the sling and cut that cast off of my foot and sent out and got a bone specialist, and he came in the room where I was and—looked at it and Dr. [fol. 44] Rice was with him and he looked at it and looked at me, well, he just looked at it.

Q. Did they take the old cast off?

A. Yes, sir.

Q. Did they put any other cast on?

A. No, sir.

Court: Not at that time?

Mr. Myres: Not at that time.

Q. Now when did they put on another cast, if they did?

A. They never did put on another one.

Q. What did they do to your foot, if anything?

A. They drilled a hole through here and put a pin through there and hang me up just that way, with a pulley through the bed and a rope in this U bolt, and weights on it, and pulled it down.

Q. Where did they drill the hole in your foot, Mr. Jenkins?

A. Right through my heel there.

Q. What kind of a pin did they put in there?

A. Steel pin.

Q. And did they attach anything then to the pin?

A. Put a U bolt on it and then tied a piece of rope, a cord,

into that, and a piece of pipe run up the foot of my bed, and a pulley on the side of that, and it run down in there and put weights on that, and where I could hold my foot just that-a-way and pull it.

Q. Did that cause any pain, Mr. Jenkins?

A. Oh, I suffered two or three deaths there.

Q. How long did they leave you in that position?

[fol. 45] A. I think it was about twelve, fourteen days, something like that.

Q. Then what did they do?

A. Well, I was just about gone, and they come around and taken it out.

Q. And after you got out of the hospital, where did you go, Mr. Jenkins?

A. I came home, to Enid.

Mr. Myres: At this time, Your Honor, we want to introduce Rule No. 93, at page 30, and Rule No. 1194, at page 121, and page 122, of the—same Rule Book heretofore referred to. At this time I want to read from page 30, Rule 93, of the Rules of the Transportation Department of the Frisco Railroad.

OFFER IN EVIDENCE

93. Yard limits will be indicated by "yard limit" boards. Within yard limits the main track or tracks may be used, protecting against first-class trains. Second and inferior class and extra trains must move within yard limits prepared to stop unless the main track is seen or known to be clear.

1194. The engineman must see that the fireman properly performs his work and observes the rules while on duty; that he looks back frequently and at the proper places; that he keeps a lookout for signals, obstructions on the track, and regulates his fire so as to be able to keep a lookout while passing through stations and approaching crossings as much as possible; that he understands, when left in [fol. 46] charge of engine, not to permit any unauthorized person to be upon it; that he understands he must not run the engine in the absence of the engineman except in some emergency when directed to do so by the conductor or someone in authority; that he assists in properly caring for the engine on trip and in every way possible makes himself an able assistant to the engineman.

Mr. Myres:

Q. Now state what was done with your arm, if anything, when you were in St. Louis. Was there any cast put on it?

A. They put a cast around my body and around my arm, had it tied over in that position (indicating).

Q. How long did it stay that way, Mr. Jenkins?

A. Somewhere in the neighborhood of about four weeks.

Q. Did this cast extend on any part of your shoulder?

A. All around my body, and shoulder, and around my arm down to there on my fingers.

Q. When was that cast taken off with reference to your being in St. Louis?

A. That was the cast they put on at St. Louis.

Q. Was it taken off there?

A. Yes, sir.

Q. Now when you arrived home, were you able to walk when you started home, Mr. Jenkins, from the hospital?

A. Able to walk on the cane like I have got now, and hop along on the side of my foot.

[fol. 47] Q. Did you return to St. Louis at any time?

A. After I left?

Q. Yes.

A. I returned back there twice after I left there, after they taken the cast off.

Q. Where did you go when you went back to St. Louis?

A. I went to the hospital.

Q. And about how many days were you there each trip you made back there?

A. The first time I was there they looked at me and taken a picture of it, and said I could go back home, and I got in there that morning, and I left that night. The second time I went back, I went in there that morning and stayed there that day and that night and came home then the next day.

Q. Now, since your injury, have you ever been able to work any?

A. No, sir, I can't work.

Q. Now what is the condition of your arm now?

A. Well, I can't get it up—about there, looks like when I kind of raise it in there, looks like it will bust it in two or something in there; I don't know, back in my back and shoulder, about as high as I can get it.

Q. Have you tried to work with it? Have you tried to use it?

A. Well, around home there, I have had some wood, I got hold of an axe, and did try to split a little wood, and I couldn't make it.

Q. When you try to exercise your arm and shoulder, what happens?

A. Well, it just hurts me down in my shoulder and back [fol. 48] and just pains me all through there; at night it pains me more than any other time; I can't lay on that side; have to get on my back.

Q. With reference to strength?

A. I haven't got any strength in it, I can't pick up anything, it is just weak.

Q. Now what do you do on your right foot and leg? What happens to that when you use it now?

A. Well, it hurts me and I walk around on it, it swells up as big as two or three legs or ankles.

Q. How far is your home there in Enid from down town?

A. It is about six blocks from where I live up on the square there.

Q. Have you tried to walk to and from town?

A. Well, I have tried to go up town and back.

Q. What happens to your leg when you walk on it, say from your home down town and back?

A. It just pains me and hurts me and swells up; as long as I am kind of easy on it it don't bother me, but I just have to stop when it swells up and pains me.

Q. What part of your foot and leg and body, or do they hurt you when you do exercise your foot?

A. Well, right here.

Court: Ankle or heel or what?

A. Ankle and leg and pains runs up in my leg and down in my ankle; I walk on this one side of it, you know, just hits this other edge.

Mr. Myres:

[fol. 49] Q. You are pointing now to the outer edge of your right foot?

A. Yes, sir.

Q. Now can you put your right foot flat on the ground in walking now?

A. No, sir, without I bend my knee in that-a-way.

Q. Will you stand up, Mr. Jenkins, and just lay your cane over there, and stand up about here?

Court: Get down on the floor.

Mr. Myres: Now put your right foot in the position flat on the ground. Where would your foot be if it was flat on the ground?

A. (indicating) Right there.

Q. Now let the record show that he has placed his right foot about a foot from his left one. Now when you walk now what position is your right foot in?

A. (indicating) That-a-way.

Q. And which side of your right foot do you walk on?

A. On this side, on the right.

Q. On the outside of your right foot?

A. Outside of the little toe, and the edge of the heel.

Q. Now is that the position you have to walk in now?

A. Yes, sir.

Q. Can you take a straight step forward and put your foot flat on the ground?

A. I can do it that-a-way.

Q. That is all now. Take your seat back there. Now does your foot and arm pain you now, Mr. Jenkins?

A. Yes, sir, hurts me down here now, foot hurts me, hurts me pretty much all the time.

[fol. 50] Q. Does your right foot and ankle hurt you?

A. Yes, all down in here, and through there.

Q. Now what salary were you making at the time you were injured?

A. I was making around two hundred and fifty, sixty dollars a month.

Q. Just state during the time you have worked for the Frisco what years that you have worked regularly as fireman.

A. I worked up until about 1930, I believe, 1930, and the depression came on; I was cut off of the board there.

Q. How long did you work regularly as a fireman?

A. Ever since August 1, 1919, up until 1930, I believe, or, I believe, it was 1930.

Q. And you fired during all that time?

A. Yes.

Q. You did no other kind of work for the railroad, other than firing for the Frisco?

A. No, sir.

Q. Now since 1930, what months have you worked, if any, during the depression years?

A. Well, around Christmas, maybe I would get a little work, and then harvest season I would get a little, couple of months' work, or month or along there, that-a-way.

Q. During the depression when you weren't working for the railroad did you do any other kind of work?

A. Yes, I done carpenter work, and I laid brick.

Q. What did you make per day when you would lay brick?

[fol. 51] A. About four and a half, five dollars a day.

Q. And how much would you make when you did carpenter work?

A. Well, I would make about the same; I done a lot of good work. I would take a job contract, you know, sometimes I would make a whole lot, then again I wouldn't make so much out of that.

Q. Now have you been able to do any kind of work, either carpenter work or brick laying or railroading, since this accident?

A. No, sir, I haven't been able to do a thing since the 20th of July, haven't made a dime since the 20th of July.

Q. Of 1937?

A. Yes, sir.

Mr. Myers: You may inquire.

Cross examination.

By Mr. Mann:

Q. Mr. Jenkins, do you mean if you had been working steadily as a fireman prior to the time you got hurt you would have made two hundred and fifty, sixty dollars a month. You hadn't been earning that much a month right along, had you?

A. You mean besides the railroad?

Q. No, I am talking about your railroad work.

A. There ain't a job down there that don't pay two hundred dollars a month:

Mr. Myres: Wait; just answer his question.

Mr. Mann:

Q. You hadn't been working steadily, had you?

A. No.

[fol. 52] Q. You were on the extra board, you were an extra fireman?

A. Yes.

Q. And, of course, under your contract between your union and the railroad, you just had to take your turn, didn't you?

A. Well, sometimes I had a regular job through harvest season, I was on a regular job when I got hurt.

Q. How long had you had that regular job?

A. Ever since I was put on the board.

Q. How long was that?

A. I have been on the board about seven weeks before I got hurt.

Q. Now, before that, you hadn't been working regularly, had you?

A. I was doing carpenter work when they called me back and put me on the board.

Court: Let him explain to the jury what he means by "being on the board."

Mr. Mann: Yes. What do you mean by "being on the board?"

A. Well, they have got a board at the round-house, gentlemen; when they reduce the force they cut out the youngest men off the board, clear off, out of the service.

Court: That is a black ball?

A. Yes, sir, like a black ball, cut you clear off, out of the service. Well, we have to get out then and hunt jobs and work and get our own jobs, and I done carpenter work and laying brick around Enid, and so last year, in harvest season, they called us all back, we firemans, put us on the board. Well, we had such a rush there and I got right into a regular [fol. 53] job as soon as they put me back on the board.

Mr. Mann:

Q. When was it they put you back on the board?

A. I really couldn't say what day that was.

Q. Approximately?

A. Well, I was steady on the board about seven weeks.

Q. Up until that time you got hurt?

A. Yes.

Q. Before that time you hadn't been working regularly for the railroad?

A. No, hadn't been working steady for the railroad.

Q. You didn't mean to say that before that seven weeks you were earning two hundred and fifty, sixty dollars a month with the railroad?

A. I said I was earning about four or five dollars a day carpentering, laying brick.

Q. The thing I am interested in now, how was that you were earning, as I understood you to say, two hundred and fifty or sixty dollars a month—now, you hadn't been earning that up to about seven weeks before you got hurt, had you?

A. Said I was carpentering, laying brick, making about five dollars——

Court (interrupting): No, wait a minute.

A. Oh, no, I hadn't been earning that from the railroad.

Mr. Mann: Hadn't had steady work with the railroad up to that time?

A. No.

[fol. 54] Q. For four or five years?

A. About 1930, I have been cut off, put on the board and called back.

Q. Now, are you a bricklayer?

A. Yes, I can build chimneys and brick wall.

Q. Have you ever learned the bricklayer's trade?

A. Yes.

Q. When did you do that?

A. I learned to lay brick when I was coming up, boy along about fourteen, fifteen years old.

Q. And you are also a carpenter?

A. Yes, I do carpentering, lay oak floors and all that kind of work.

Q. Ever since 1930 when you were laid off with the Frisco, up until about seven weeks before you were injured, do you tell the jury you had been making regularly four and a half to five dollars a day?

A. Yes.

Q. Right straight through. Who were you working for?

A. I was working for the government. I helped build that armory there.

Q. The government wasn't paying you four and a half to five dollars a day?

A. They was giving us $56.10 for eleven days' work.

Q. And you worked only eleven days a month?

A. I worked for them eleven days.

Q. That is what I am saying. Now, who else did you work for?

A. Worked for the railroad men, and carpenters, I worked for them brick men and them contractors around there, got jobs laying oak floor for them, and first one and [fol. 55] then another.

Q. And when you were working you were making as high as—you didn't have steady work all the time as a bricklayer or carpenter, did you?

A. Sometimes I would get up with bricklaying, of course, and go to carpenter work.

Court: He asked you did you have steady work?

A. I was pretty always steady.

Mr. Mann: And you tell the jury here you worked on WPA eleven days in the month, even though you were getting work the rest of the month other places?

A. Yes.

My regular run at the time I was injured was from Beaumont to Enid. I had been on working between those two terminals about a couple of weeks. I had not worked up through there before that time at any time. This train, No. 630, didn't ordinarily turn around at Arkansas City, we ordinarily went through to Enid, but the day this accident happened there was a wash-out down there, so we turned around and started back toward Beaumont. I suppose if it hadn't been for that wash-out we would have gone on to Enid instead of turning around at Arkansas City.

Q. Yes, and while you say this was a time-card train, you didn't mean to say you were running at that time on a schedule, time-card schedule, did you?

A. When they turned us around at Arkansas City and back to Beaumont it was six-thirty on the time-card, they [fol. 56] run us extra down there and run us back on six-thirty.

Ordinarily, our train coming into Winfield took water there.

Q. And coming in from the south when you were going to take water at Winfield you would pull your train up to the Santa Fe crossing and stop there and cut your engine off and go in and get water, wouldn't you?

A. Sometimes we would, and sometimes we wouldn't.

Q. Well, it was the custom of trains coming from the south —your train and others—that took water at Winfield—to cut their train off just south of the Santa Fe crossing, take the engine on and get water and then come back and couple on to the train and go on, that was right, wasn't it?

A. Yes.

Q. So that it was customary thing to see trains standing south of the Santa Fe crossing where you found this caboose and train standing when you approached there—that was where they stood when the engine went in to get water?

A. Yes, that was where they stood.

Q. You knew that?

A. No, sir, I didn't know it.

Q. You had cut your own train off before that and come in to get water—I don't say you knew this particular train was there, but you knew that trains from time to time cut off and stood there?

A. Sometimes they cut them off and sometimes they [fol. 57] didn't, according to how many cars they had.

Q. I am not speaking of your own train, limiting it to your own train, but you knew your train and others very frequently left the train right where that train was that day.

A. I couldn't say what the other fellows done, I knew what I had done every time I was on the train.

Q. And you had done that?

A. Yes, I had done that sometimes and sometimes I didn't.

Q. Didn't you know it was the custom of other trains to do that?

A. I didn't know what they done.

Q. If they stopped to take water at Winfield, that is what they did, isn't it?

A. I don't know what they did.

Q. I know you didn't, but if they took water at all that is what they did?

A. They would pull it on up to the tank and take water.

Q. Your instructions on freight trains were to cut the engine off from the train to take water?

A. I never seen no instructions to that effect.

Q. You never have?

A. No.

We got to Arkansas City that day along in the afternoon,

I really couldn't tell you what time we got there. It was in the afternoon. The rest of the crew and I, the train men on our train, went up to a restaurant and got supper, the road-master, Mr. Patterson, was with us. He didn't have anything to do with the operations of the trains, he has no [fol. 58] supervision over we men that are train men. He just has supervision of the road-bed and keeping it up. When I came back down to our train, I didn't see the train 1229 there. No member of their crew was there.

Q. They hadn't left Arkansas City at the time you got back down to your train?

A. I suppose they had.

Q. You hadn't seen them?

A. No.

Q. Now did you see them when you came in there? Did you see them any time, that crew or train, any time while you were in Arkansas City that afternoon?

A. I never noticed.

Q. When you left Arkansas City and went back to Beaumont, the train orders were delivered to you?

A. Delivered to the engineer.

Q. And you read them?

A. Yes, I read them.

Q. And one of those train orders was that you were to leave Arkansas City at what time—six-thirty?

A. I didn't see no order to leave there, what time.

Q. Did you have an order to set there until a certain time?

A. I didn't see that order.

Q. There was an order, though, that train 1229 would run ahead of you to Beaumont?

A. I read an order for extra 1229 to run ahead of us, Arkansas City to Beaumont.

Q. So that when you left Arkansas City that evening, you knew this extra train 1229 was ahead of you?

A. I had an order to that effect.

[fol. 59] Q. You say you hadn't seen the train 1229 at any time after you got to Arkansas City that day?

A. No; I hadn't seen them.

Q. Now how far, approximately, is Winfield from Arkansas City?

A. I just don't know that mileage across there; I can't recall it.

Q. Do you remember that Arkansas City is at mile post

4157, and that Winfield is at mile post 504, plus four poles?

A. No, I don't know.

Q. Well, is the distance of fourteen miles between the two towns approximately correct?

A. I suppose so.

Q. That is your best judgment about the distance. Now I want to refer to this plat—Exhibit "A"—your train came from our left as shown on this plat going to the right this way, that is right, isn't it?

A, Yes.

Q. That put you—your box was on the left side of the engine?

A. Yes.

Q. Or on the upper side of this plat, that is right, isn't it?

A. Yes.

Q. Now as you cross the Walnut River Bridge, which is shown to the left of this plat, or soon thereafter, that train starts curving toward the engineer's side or toward the right, doesn't it?

A. Yes.

Q. And there is considerable curve there for several hundred feet?

A. After you get off the bridge it curves, after you get off the bridge it straightens out.

[fol. 60] Q. That is what I say, after you get off the bridge there is considerable curve to the right for several hundred feet?

A. I don't know about the hundred; I haven't been there and measured it.

Q. Is it several telephone pole lengths?

A. I don't know.

Q. Several, though, isn't it?

A. I don't know; I never paid no attention to that part.

Q. After you come around on the straight track, after making that curve to the right, you come to the yard limit board, don't you?

A. Supposed to be a yard limit board.

Q. Well, you have seen it, haven't you?

A. I don't know whether I have seen it or not, it is on the engineer's side going and coming back on our side, the lights were from this.

Q. Well, you knew where the yard limits were there at Winfield, didn't you?

A. Two boards here——

Court (interrupting): Now, wait. That isn't the question he asked; he asked you if you knew where the yard limits were there at Winfield.

A. Well, I know about, practically.

Mr. Mann:

Q. You knew you were in the yard limits before you got to the electric light plant, didn't you?

A. Well, yes, we was——

Court: That answers it.

Mr. Mann:

Q. Do you know the point where, after you cross the Walnut River Bridge, where the river comes back almost [fol. 61] to the right again as shown on this plat?

A. I never paid any attention to that river.

Q. Then from the point where this yard limit board is or the south yard limit, then the track is straight south about what distance?

A. I judge it is straight down there about seven or eight poles, maybe more.

Q. Seven, eight or nine poles?

A. Yes, sir.

Q. Do you know how far those poles are apart there or how many of them there are to the mile?

A. I think about thirty to the mile.

Q. Thirty to the mile or about is one hundred and seventy-six feet apart, that is right, isn't it?

A. The way you figure it, it is.

Q. Well, you know there are thirty to the mile there at that point?

A. I suppose there are; I never have measured them.

Q. Now when you get to the north end of that straight track—we will call it the north—end of the straight track toward Winfield, there is a road crossing, isn't there, public road crossing?

A. Yes.

Q. And right about——

A. (Interrupting:) I don't know whether it is a public road crossing.

Court: Well, there is a road crossing.

Mr. Mann: Road crossing, a highway, country road of some kind, road crosses the track there?

A. Yes.

Q. Now, to your left as you come down there, and about [fol. 62] where that road crossing is, is the race track, that right?

A. Well, yes, on this road crossing; then there is a race ground over in there.

Q. That is what I say.

A. I suppose it is, I never paid no attention.

Q. Well, you knew there was a race track there, didn't you?

A. No, I never, along there when there was any races, I don't know; I never did notice any.

Q. Well, you knew there was a carnival ground of some kind. I say you knew there was some sort of a carnival there or fair grounds where people congregated?

A. I have seen it there.

Q. Well, you saw people there that evening, didn't you?

A. No, I didn't see no people there.

Q. Did you see any carnival troupe or equipment, anybody around this race track or grounds that evening at all?

A. I didn't see anything like that there.

Q. Well, you saw the race track.

A. I wasn't paying any attention to it.

Q. Wasn't paying any attention to it. Now shortly after you pass the race track, then the track starts curving to your left, or to your side of the engine?

A. Yes.

Q. And after you get around that curve then the track comes straight up to the Santa Fe crossing?

A. Yes.

Q. The place where the caboose was standing was on the curve but near the south end of the curve or the end of [fol. 63] the curve toward Arkansas City, wasn't it?

A. I wouldn't say, it went out, right around here, this crossing, looks to me like the caboose was about ten or fifteen car lengths over to the—I wouldn't say what pole it was standing at nor nothing like that.

Q. Where were you when you say you saw the caboose ten or fifteen poles away from you?

A. I was along up in here about the road crossing getting away from those trees where I could see.

Q. You are speaking about the road crossing we identified a moment ago that is about opposite the race track?

A. Yes.

Q. That is where you were, about that road crossing, when you saw the caboose?

A. Yes, sir.

Q. And it was ten or fifteen car lengths on to it or toward Winfield from you?

A. Yes.

Q. Then the other end of the train was up near the Santa Fe crossing wasn't it?

A. Yes.

Q. In other words, all the track from the caboose—where the caboose stood—almost to the Santa Fe crossing up here was a solid line of freight cars?

A. Yes.

Q. Now the trees you mentioned were right along about the edge of this race track, weren't they?

A. Yes, around here, clean up around this curve here.

Q. Well, when you say curve you are referring to the curve of the race track?

A. I am referring to the curve of the railroad.

[fol. 64] Q. Well, isn't that straight track there?

A. No, straight track down here; it curves down here.

Q. Well, where were the trees with reference to the race track?

A. All alongside the race track.

Q. Alongside the race track?

A. The right-of-way, the railroad right-of-way, this growed up in here.

Q. Well, of course, you don't know yourself where the right-of-way lines were, you know nothing about where the line is, do you, the railroad company's property?

A. I never did measure it.

Q. Well, you don't know how much land they have got out there, do you?

A. No.

Q. So you don't know whether any trees are located on the railroad company's property or not. You just know there were some trees off to the side of the track?

A. I just know it is growed up along in there, all along, with trees.

Q. But whose property they were on, you don't know?

A. No.

Q. I am trying to get you to locate these trees; they were about opposite the race track, weren't they?

A. That was growed up clean along down in here to where this curves in; when I got down in here the engine kind of turned around that way about this crossing here; I could see the caboose ten or fifteen cars, but up in here from this light plant all in through here, plumb full of [fol. 65] everything, trees, bushes and everything else.

Q. I will ask you about that. Now back south—we will turn it south—back about the WC board from the road crossing about where you were when you saw the caboose there is a spur track leading off on your side of the track up to the light plant, isn't there?

A. Yes.

Q. Now there are no trees between the light plant—spur track and the light plant?

A. On the other side of the track, growed up in there; there ain't none on the main line between that and the spur track, but on the other side.

Q. You mean the other side of the spur track?

A. The other side of the spur track.

Q. That would be putting it to your left as you came down in there? Those trees didn't obstruct your view?

A. Why wouldn't they?

Court: Don't argue. Just answer.

A. Yes.

Mr. Mann:

Q. Where I am pointing here, that is, were there trees north of this spur track

A. Yes, up here and all down in there.

Q. Now you tell me that when the engineer—you told Mr. Myres—that when you train came over about the Walnut River Bridge that your engineer applied his brakes there and reduced his speed to about six miles an hour, is that right?

A. Down at this end of the bridge, going north.

[fol. 66] Q. Going north, and then he released his brake

after he had gotten off the bridge and drifted on down there, you say?

A. Yes.

Q. Now from the time he crossed this Walnut River Bridge until this accident occurred, there was never a time when the engineer could have seen this caboose or line of cars, was there, that you know of?

A. I don't know what you can see on the right hand side, I ain't never been on the right hand side.

Q. Well, you knew that his view of anything up around on this curve here as you approached the Santa Fe crossing was obstructed, wasn't it?

A. I can't see on the right hand side, I can't say what is on the right hand side.

Q. Oh, well, you have been over that track time and again.

A. I ain't never run—I ain't on the right hand side, and I can't tell what is on the right hand side.

Q. And you know, don't you, that the boiler of that engine extends out about thirty feet?

A. No, I don't know what you can see over there.

Q. That isn't what I asked you. Don't you know that the boiler or front end of the engine extends out approximately thirty feet ahead of where the engineer and fireman set in the cab?

A. Yes.

Q. And the top of the boiler is much higher than the fireman's head as he sets in the cab?

A. Yes.

[fol. 67] Q. Well, you know the front end of that boiler would obstruct the engineer's view around to the left, wouldn't it?

A. I can't tell what is on the right hand side or what kind of a view it would obstruct or nothing.

Q. You know this: that when you were back south of the Walnut River Bridge with the track curving to your right as you came up that straight track, you couldn't see anything about the light plant, could you?

A. Not when I was across the bridge; I had to get over there to see the plant.

Q. What kept you from seeing it?

A. Seeing what?

Q. Down the track back here to the bridge opposite the light plant, as you came around the curve?

A. I did see when we come off the bridge here, I could see across the light plant and you could see that.

Q. But you can't see straight down the track, can you?

A. When you come off the bridge, at times I could see straight down the track.

Court: Wait.

Mr. Mann:

Q. I am asking you before you get to the straight track when you are on this curve, your view is obstructed down the main track?

A. Yes.

Q. What does it?

A. Light plant and all those things.

Q. Isn't the front end of the engine that obstructs your [fol. 68] view?

A. No, the front end of the engine don't obstruct there.

Q. You say it will or won't?

A. Well, after you get off the curve it won't.

Q. That is what I am asking about.

A. Of course, when you are on the curve it will.

Q. Then the same thing that obstructed your view when you were coming on this first curve obstructed the engineer's view around this curve, didn't it?

A. He couldn't see around this curve.

Q. Why, certainly. We could have saved a lot of time a long while ago, if you had answered it.

Court: I want you to answer his questions or the court is going to have to take a little harsher means.

Mr. Mann:

Q. You knew from the time you got down here past this Walnut River Bridge as you came down here that the engineer couldn't see anything that was on this track around the curve at all, didn't you?

A. Yes, he couldn't see anything around the curve.

Q. And you tell us that it then became your duty to look out for him because he couldn't see?

A. Well, it was my duty——

Court: That is enough.

Mr. Mann: You told Mr. Myres you would have had to look across the country here before you would have seen

this train before you did. You could have seen it from the [fol. 69] time you left this yard limit board any time after that you could have looked to the north of these trees across here and seen some part of that train any time if you had looked?

A. I wasn't looking across.
Q. I am convinced you weren't.
A. I don't know.

Court: He says he don't know.

A. I can't see through those trees.

Mr. Mann:

Q. But you could have seen it looking to the north of those trees?
A. I can't see anything on that side until I get down to the curve.
Q. Don't you know that if you had looked back here near the yard limit board or any time after you were between the yard limit board and this crossing, if you had looked to the north or your left of these trees you could have seen some part of these cars or trains standing around here?
A. I don't know it.
Q. You don't know it?
A. No.
Q. Did you tell the engineer you didn't see anything?
A. Did when I saw the train.
Q. That is the first thing you said to him?
A. Yes, when I saw the caboose.
Q. Now you say that at the time you saw this caboose?
A. Yes.
Q. (continuing) You were in position then you could look right down the track and see it?
A. After I got down on the curve here I could see it.
[fol. 70] Q. You were looking right down the track when you saw it?
A. Looking right down the track.
Q. And you weren't looking across country when you did see it, were you?
A. Of course, I was looking down the track.
Q. You say at that time when you saw it and called to the engineer if he had applied the brakes then he could have stopped that before you struck the cars?
A. Yes, sir, I suppose he could.

Q. That is your judgment about it?
A. That is my judgment about it.
Q. Now you say that was ten or fifteen car lengths?
A. Yes, sir.
Q. And you figured about forty feet to the car?
A. Something like that, I guess.
Q. Without regard to what you could see, you said you couldn't see anything if you had looked across country, you tell us you didn't look across country?

Court: That is his answer.
Mr. Mann: I wanted to be sure about it.

A. I didn't look across country.
Q. You never made any effort to see whether there was a train there except looking right down the track?
A. That was my duties to look down the track.

Court: He is asking you if that is all you did?

A. Oh, yes, sir.

Mr. Mann:

[fol. 71] Q. Now the situation there with reference to trees and all the physical surroundings, there was no difference there that day than there was on the other trips you had made through there. The trees were the same and the physical conditions were unchanged, that is right, isn't it?
A. As far as I know they were.
Q. Now you say that when you first saw this when you were about at the road crossing or ten or fifteen car lengths from the caboose, what did you do then, when you first saw it?
A. I hollered for the engineer to pull the brake valve over in emergency.
Q. You don't know whether or not he heard you?
A. He looked around.

Court: Wait a minute, he has asked you a question—you don't know whether he heard it or not. What is your answer? Then if you want to make any explanation you can do so.
A. He didn't say anything.

Mr. Mann:

Q. He didn't say anything?
A. No.

Court: Do you want to make any explanation following that?

Mr. Mann:

Q. I will ask him a question. You say then he looked toward you or looked around?
A. Yes.
Q. But he said nothing and he did nothing?
A. No, he didn't do anything.
Q. Then you didn't say anything more to him?
A. Got down off my seat box.
[fol. 72] Q. You rode quite a ways——

Court: Wait a minute; he asked you if you said anything more.
A. No.

Mr. Mann:

Q. The only thing he did was look toward you?

Court: Answer that; I want this in the record. What is your answer?

A. No, sir.

Mr. Mann:

Q. He didn't apply his brake?
A. No, he didn't apply it.
Q. So, except for looking toward you, he did nothing or said nothing to indicate he understood what you were telling him?
A. No.
Q. What had you told him?
A. I told him to pull the brake valve over in emergency, that a train was standing down there in front of us.
Q. Then when he didn't do it, you tell us that you sat there on your seat box until you got down to within about three car lengths of the other train?
A. No, I didn't say that.
Q. Well, when did you get off your seat box?

A. When I told him that I got down off the seat box.

Q. Immediately?

A. And went over on his side; of course, we were going down about a car length or more and I got off my seat box and went over on his side.

[fol. 73] Q. The first time you said anything to him you were ten or fifteen car lengths from the caboose?

A. Yes.

Q. Then you say that he didn't do anything except look toward you and then you got down off the seat box and went over to his side, now how far had your train moved before you got down off your seat box?

A. I suppose moved down about a car length maybe, something like that.

Q. About forty feet?

A. Something like that.

Q. Then what did you do?

A. I kept waiting for him to do something, kept drifting on down there and didn't do anything.

Q. Is that all you did, just stood there, waiting for him to do something?

A. I got down about two or three cars of the caboose and went in behind him, got in the gangway, and about that time he pulled the brake valve over in emergency, and about that time I got down on the bottom step and jumped off.

Q. I want to see if I understand you.

Court: That your answer?

A. Yes, sir.

Mr. Mann:

Q. Where did you go after you had only moved a car length, you say you got off your seat box, what did you do?

A. I was down in the deck and I went over toward him.

[fol. 74] Q. He hadn't done anything and you didn't say anything more to him?

A. No, sir.

Q. And you didn't say anything more to him?

A. No.

Q. Now, you never spoke to the engineer or hollered to him except the one time when you were on your seat box ten or fifteen car lengths from the caboose, that was the

only time you had ever spoke to him about it, you have already testified you never said another word to him.

A. No.

Q. And you stood right there behind him while he ran from nine or fourteen car lengths from the caboose down to about three car lengths of the caboose, didn't you?

A. Yes, sir.

Q. And without ever saying a word to him?

A. Yes.

Q. And during that time you knew he couldn't see that caboose, didn't you?

A. He could see it up to two or three cars when I jumped off.

Q. That isn't what I am asking you. From the time you got down in the gangway up to the time you got ready to jump, you knew his view of the caboose and the rest of the cars, of that train, was obstructed?

A. Yes, he couldn't see it; when I jumped off, he could see it, though.

Court: He means before that.

A. No, not before that.

Mr. Mann:

Q. Before that he couldn't see it?

A. No.

[fol. 75] Q. And you knew that, didn't you?

A. Yes.

Q. And yet you said not a word to him?

Court: He already testified about six or seven times.

Mr. Myres: That is repetition.

Court: Yes, that is repetition.

Mr. Mann:

Q. Have you got a whistle button on your side of the engine?

A. No.

Q. Wasn't there a whistle cord or whistle button or valve on the fireman's side of that engine, which you could have used to whistle, now there was, wasn't there?

A. I don't think there was a whistle button on my side; the engine just came in and they hadn't had it very long.

Q. Aren't you mistaken about that? On that trip, hadn't you sounded that whistle?

A. No.

Q. And you tell the jury there was no means on your side of that engine to sound the whistle?

A. As well as I recollect, I don't think that was equipped on my side with a whistle.

Q. You had a bell cord?

A. Yes, had a bell cord on one side.

Q. Did you try to ring it?

A. No, I didn't try to ring it.

Q. You didn't do anything except that first holler to him to give him any warning at all, did you?

A. That is all I did.

Q. And you got down and jumped?

A. Yes.

Q. Ready to jump, still never having said anything more to him?

[fol. 76] Mr. Myres: We object to that as repetition.

Court: Objection sustained; he said that so many times there can't be any misunderstanding about it.

Mr. Mann:

Q. Where were you when you heard the air applied in emergency, what was your position?

A. I was going down on the first step.

Q. Getting prepared to jump?

A. Yes.

Q. And you say about the time the air applied in emergency was when in your judgment was the first opportunity the engineer had to see the caboose?

A. Yes, when it was about two or three car lengths.

Redirect examination.

By Mr. Myres:

The engineer handed me this train order in Arkansas City. The conductor gave it to him and they read the orders and then he handed it over to me. I gave it back to the engineer.

Q. Now how many trips had you made up to Beaumont, that is, say, during the year 1937, prior to this trip?

A. I hadn't been up there about a couple of weeks, I think; I had made about seven or eight trips; something like that, as well as I recollect.

I had known the engineer, Reece, ever since I went to Enid, 1919. I had made runs with him before. As far as I know his hearing was all right. I had talked to him, normal conversation in our cab, and he could hear me. His eyesight [fol. 77] was good as far as I know. I had been out with him on trips before.

Q. Just how big is this cab inside there, Mr. Jenkins, your cab of this engine you were in that day?

A. I just don't know the exact feet across from inside my seat over to the engineer's seat, but somewhere in the neighborhood of——

Q. (Interrupting:) Well, just illustrate here to the jury just about how far it is.

A. Well, it is just about—in the deck it is about as wide as from the south side of the witness box, south side of the witness box to the north edge of the jury box.

Q. Now, you just place me, now you tell the jury just about how far your face was from the engineer's face at the time you yelled to him.

A. I suppose you are about the same distance I am, just about it, right at it.

Q. Now are you on the same level?

A. Yes, sir, same level.

Q. And when you gave this signal—you tell the jury now as near as you can remember it, just the signal, and in about the tone of voice, and motion, or anything else you made, just tell the jury about what you yelled when you were in the cab there, as you have stated it.

Court: Now he has already gone over it.

Mr. Myres: I want him to tell the tone of voice he said it in.

A. Well, I hollered to him loud, gentlemen; the caboose was setting down there; I said; "Pull that brake valve over in emergency."

[fol. 78] Q. Did you make any motions with your hands when you did that?

A. Well, I don't think I made any motions with my hands, I just hollered to him.

Q. Now have you talked to your engineer backwards and forwards in making trips in the cab?

A. Yes.

Q. Can he understand you, or do you know Reece to be a man of hearing—that he understood the signal you gave him?

A. We talk to one another, you know, across, with anything, kind of carry on business, or train order; he would set over on his side of the seat and I would set on mine; we would talk to each other.

Q. Now what is your duty when you come to a curve which takes to your left, or what would be an inside curve to you, what is your duty when you come to those curves as a fireman?

A. My duty is to look out ahead and see what I can see, whether anything is on the track or anything in front of us.

Q. What was your duty with reference to that crossing, for instance, you say was there, what was your duty when you came to that or before you get to it, when you approached it, what was your duty from the fireman's side?

A. See whether there was anything on it or not, or anything obstructing it or causing any danger or anything.

[fol. 79] Recross-examination.

By Mr. Mann:

Q. Mr. Jenkins, before you ever got to the Walnut River Bridge, you had your injector on?

A. Yes.

Q. Now the injector is the mechanism of the engine by which you pump your water to your boiler?

A. Yes, sir.

Q. From your tank?

A. Yes.

Q. And there is a good deal of steam escapes during that operation and considerable noise?

A. No, the injector don't make steam and noise, they just kind of sing a little when you first put them on, and then you can't hear them hardly.

Q. Of course, there is considerable noise?

A. Might make a lot of noise, but there ain't nothing with the injector.

Q. Of course, there is considerable noise about the cab of the engine, outside of the injector?

A. No, the train don't make any noise.

Q. Well, I say, outside of that there is considerable noise?

A. No noise up in the cab; the train running is about all the noise there is; there isn't any noise up in the cab from the injector.

Q. Was there a gauge on your side of the cab for you to watch while your injector was running so you could tell when you had enough water in your boiler?

A. The water glass is on the boiler.

Q. Well, that is a gauge, isn't it? Were you watching that?

A. Sometimes I would look at it, see where the water was standing in it; have to do that to keep the boiler from blowing up.

[fol. 80] Q. And you were still pumping water into your boiler at the time you got down off your seat box?

A. Yes.

—W. O. Cowan testified as follows:

Direct examination.

By Mr. Myres:

I live in Greenfield, Missouri. I am a physician; I practice general medicine, surgery; I have practiced here since 1931. I do not know the plaintiff personally, met him yesterday is all. I gave him a physical examination. I took a history of some injuries which he had received.

Q. Now, in addition to the physical examination and X-rays, did you make other tests and observe his arm and legs and other affected parts?

A. Just the physical examination of them.

Q. Now, Doctor, do you have X-ray equipment in your hospital here?

A. Yes, sir.

Q. Did you take X-rays and develop them yourself?

A. Yes, sir.

Q. And how long have you been doing that, Doctor?

A. Since 1933.

Q. Let's see your X-ray, Doctor, did you take some X-rays of this man?

A. Yes, sir.

Q. Will you produce them, please, so I may have the reporter to mark them? Now, Doctor, I hand you what

has been designated as Plaintiff's "Exhibit B" and ask you to put that in your X-ray picture; what is that, Doctor?

A. Picture of the shoulder.

[fol. 81] Q. Of whose shoulder?

A. Jenkins' shoulder.

Q. Right or left?

A. It is the right shoulder.

Q. Now, Doctor, what does that picture show there, if anything?

A. It shows an old fracture, evidences of an old fracture.

Q. And can you point that out to the court and jury?

A. Yes, sir.

Q. Where that fracture is?

A. There has been a piece of bone out right along here.

Q. Does that show plainly there by that picture?

A. The abnormal position shows me that bone has been loose there at one time.

Q. Now, Doctor, from your examination of his shoulder, in addition to that fracture, what else did you find wrong with it, if anything?

A. He is unable to lift his arm, raise his arm, literally.

Q. Is that a normal position that he is able to do or is it abnormal?

A. That is abnormal, what he is able to do.

Q. What limitation does he have in that arm that you found?

A. He can't raise it up and down.

Q. With reference to the strength of his right arm?

A. There is a weakness between the right and left arm.

Q. Now, Doctor, do you have a picture of a normal shoulder, right shoulder?

A. Yes, sir.

Q. I will hand you what has been designated "Plaintiff's Exhibit C."

A. This is not quite as plain, but it shows what I intend to show in this picture.

[fol. 82] Q. Now what difference, if any, can you point out between Plaintiff's "Exhibit B" and Plaintiff's "Exhibit C"?

A. Normally, then this part of the bone right here is below the level of the upper part of that articulating surface. You see, there is a difference between here and here; that is, as normally exists.

Q. Now what exists back here now in Plaintiffs "Exhibit B," which is of the plaintiff's right shoulder?

A. Normally, as I showed you, it would be such as it was there; now you see this surface here I talked about, where there had been a fracture that extends up here, now level with the top of the articulating surface of that bone; in other words, there has been a displacement of that fragment of bone that was broken off there at one time.

Q. Now, did you take, also, X-rays of Mr. Jenkins' foot?

A. Yes, sir.

Q. I now hand you what has been designated by the reporter as Plaintiff's "Exhibit D," ask you to put that in your box.

Q. Did you take that X-ray?

A. Yes, sir.

Q. And the previous X-ray marked Plaintiff's "Exhibit B"?

A. Yes, sir.

Q. And develop them in your laboratories?

A. Yes, sir.

Q. On yesterday?

A. Yes, sir.

Q. The day before this trial?

A. Yes, sir.

Q. I will ask you to point to Plaintiff's "Exhibit D," [fol. 83] which is now in the box, and just tell the jury what that picture shows you that you took yesterday of the plaintiff, if anything?

A. I would rather show them the normal one, first, and then they can understand it, if it makes no difference to you.

Q. No, it doesn't make a bit, Doctor. I will hand you what has been designated Plaintiff's "Exhibit F."

A. This is the normal foot.

Q. I hand you Plaintiff's "Exhibit F" and ask you to state what that is.

A. That is a picture of a normal foot.

Q. Now will you—did you take Plaintiff's "Exhibit F," Doctor?

A. No, sir, this is a normal foot; it isn't his foot; it is a normal foot.

Q. Will you just state and illustrate by Plaintiff's "Exhibit F" and the exhibit which you previously had marked "D" and just tell the jury the difference in the two?

A. The normal one, as it exists here, this is the heel bone, if you notice it sets at an angle something like this as it occurs there in that picture; if you notice, this is the bone that the tibia rocks on; in other words, they call it the "rocker" bone; it sets on this bone and it sets on this bone, and it is setting up at an angle about like this; that is, of a normal foot.

Q. Now when you have a normal foot as displayed there by Plaintiff's "Exhibit F," what bones carry the weight of the body in the process of walking?

[fol. 84] A. Well, due to the fact we have this "rocker" bone here, or the talus, as it is called in medicine, it rests on the heel bone, and it also rests on the bone which is in front of it, the navicular bone, and it makes a pressure both in front and behind, at the same time, and gives a spring like, as you see, to the arch in here, as the bone now exhibits.

Q. I will hand you now what has been designated Plaintiff's "Exhibit D" and ask you to state now what that X-ray shows.

A. X-ray shows a fracture of the heel bone and displacement; the displacement, as I told you here in this ankle, as you will see here in a normal foot; now if it is fractured it sets like this, and if you will notice this part right here of this bone, instead of being in that normal position with this bone right here, it now rests up here, and that fragment that ordinarily sets across here is now pointing downward and you can see the tip of it sticking down below the bone and the tip of this fragment of it sticking down in front of that bone; in other words, those two tips of those fragments come in like that, the point of this one is sticking here and the point of that one is sticking down there, and ordinarily that part of it should be sticking back like this, as the piece of the heel bone.

Q. What about the tip or the back end of the heel bone?

A. That is what I am speaking of. Now the talus is another fracture, and that is much more important than the [fol. 85] fracture I have just now spoken of.

Q. Will you show to the jury the fracture of any other bones?

A. That is this bone right here or the rocker bone, as I told you, that rests on the heel, and rests here.

Q. Now you are pointing to your normal foot and now you are pointing to the abnormal foot.

A. Yes, I am pointing at the talus bone.

Q. In Plaintiff's "Exhibit D."

A. The articulating surface of this bone is no longer right here, primarily; you see it was down here; in other words, that bone has been changed from that angle down to this angle; that bone has been driven downward into the body of the heel bone and split it open and there is the fragments of the heel bone, one of them sticking in that direction, and one of them in that direction, and this bone has been driven downward into that talus, or calcaneus bone.

Q. Now the calcaneus bone—what other abnormality did you find with reference to its position other than being fractured and splitting up instead of downward?

A. You mean the talus bone?

Q. Yes.

A. This is the calcaneus.

Q. Yes.

A. That bone has been slightly turned.

Q. And what effect does that have upon the plaintiff, if any?

A. That makes a different walking angle.

[fol. 86] Q. And what angle does he have to walk on now, if you know?

A. It is like that (indicating). In other words, the articulating surface of this bone instead of being driven straight down there is tilted just a little bit; one side went a little bit lower than the other did; there is a line and there is a line and that is the two different margins of that articulating surface; consequently, he compensates by putting his tibia down to take care of that articulating surface.

Q. In order to put his foot down on the ground in its natural position, about how far does he have to extend it to his right or straight out?

A. I would say approximately a foot from the normal position.

Q. Doctor, with reference to Plaintiff's "Exhibit D" what does it show there with reference to those two bones as to fractures, if anything, other than what you have said?

A. Just in the position of them, in addition to the fractures.

Q. How many traces of fractures can you see there by that X-ray picture which has been taken yesterday?

A. I can see two different traces.

Q. And in how many bones now?

A. In one bone.

Q. Now, Doctor, what does that X-ray show there with reference to fibrosed or calcification area?

A. Since this talus bone has been driven down into the calcaneus and this bone has been opened up there will be a [fol. 87] permanent union between this bone and that bone; ordinarily, there is a joint union between them.

Q. Will they become solid in time?

A. Yes, sir.

Q. Now, pointing again to the normal X-ray of the normal foot or the normal foot heel——

Court: "Exhibit F."

Mr. Myres: "Exhibit F"—what does it show there with spaces between those different bones there in the foot?

A. The normal spaces that exist between those bones, as you see there, and there, are articulating surfaces that have been jammed together.

Q. And will there be an ankylosis condition exist between all of those conditions in the bottom part of his foot?

A. Yes, sir, to a certain degree, yes, sir, to a certain degree; there will be ankylosis.

Mr. Myres: Now, we now offer in evidence all of plaintiff's exhibits, marked "B" to "F," inclusive.

Court: Plaintiff's "Exhibits B-F," inclusive, are now offered and admitted in evidence without objection.

Mr. Myres:

Q. Now, from your physical examination, Doctor, of this man's right foot and right ankle, and right shoulder, what is your opinion as to his present condition?

A. He has a permanent disability.

[fol. 88] Q. And what is your opinion as to whether this man will ever be able to work or use his right leg?

Mr. Mann: I object to that, invading the province of the jury.

Court: Well, I will sustain the objection to that question, to what extent, you may ask, will he be disabled physically from performing physical work.

Mr. Myres: Well, what is your opinion, Doctor, as to his ability to perform physical labor?

Mr. Mann: I object to that as invading the province of the jury.

Court: Based upon your examination of the man physically taken together with the X-rays which you yourself took and developed, can you say to the court that you are able to answer that question?

A. Yes, sir.

Court: The objection will then be overruled.

To which ruling of the court defendants excepted at the time and now except.

Mr. Myres: What is it, Doctor?

A. I think that he will be disabled from performing manual labor on that foot.

Q. You mean permanent, eternally, as long as he lives?

A. Yes, sir, because it will be painful.

Q. And is that the type of injury, Doctor, of the shoulder and of the ankle, is that a type of injury which would pro-

[fol. 89] duce much pain?

A. The foot will produce lots of pain.

Q. And will it continue to do that as long as he lives?

A. Yes, sir.

Mr. Mann: I want the record to show he answered it before I had an opportunity to object. We object to that opinion of the witness as invading the province of the jury, what it will do.

Court: That last question—I don't know whether he answered it or not; I think the objection is well-lodged to that. Now, Doctor, so the court may understand what is or is not in this record: does your statement go to permanency to all injuries you have described or merely to the foot?

A. Especially to the foot, you can have a disability to the shoulder, but I am not saying how painful it will be, but he will have a permanent disability to the shoulder.

Court: Proceed.

Mr. Myres:

Q. Now from your examination of this foot, Doctor, do you have an opinion as to whether or not he is able to use it say an hour or two hours at a time?

Mr. Mann: I object to that as invading the province of the jury.

Mr. Myres: He is an expert, Your Honor.

Court: Well, the court thinks your question is all right if you will qualify him to show he has had any sufficient ex-
[fol. 90] perience with this kind of injury to tell how long a man would be able to work on that.

To which ruling of the court the defendants excepted at the time and now except.

Mr. Myres:

Q. Well, Doctor, have you had considerable experience with people with injuries similar to this man's injuries?
A. One of my last fractures was a case similar to this.

Court: Read the question, Miss Reiley; that don't answer the question.

A. I had one case similar to this case.

Mr. Myres:

Q. And in the study of medicine have you studied different types of fractures and different deformities and abnormalities?
A. Yes, sir.
Q. From all that, do you have an opinion as to whether this man can use this foot say for an hour or two hours, steady walking?

Mr. Mann: Just a minute, I object to that as invading the province of the jury.
Mr. Myres: Well, he has already testified he was permanently disabled; you may inquire.
Court: All right, unnecessary to rule if you will withdraw it.

Cross-examination.

By Mr. Mann:

Q. Now, Doctor, on the picture as to the shoulder—this picture of the normal shoulder, you had before you took the one of his arm?
A. Yes, sir.
[fol. 91] Q. And that picture was taken with the arm hanging practically in the normal position at the side of the body, is it not?
A. Yes, sir.

Q. And you brought it here for comparative purposes, that is all?

A. Yes, sir.

Q. Then, when you took the picture of this man's shoulder you took it with his arm extended out from his body, did you not?

A. Yes, sir.

Q. At an angle of about forty-five degrees below the horizontal?

A. Yes, sir.

Q. Which, of course, put the top—this is the humerus, isn't it?

A. Yes, sir.

Q. And it was what we are referring to as the—what is it, the ball of the joint?

A. Yes, sir.

Q. It put the ball of the joint or upper end of the bone in a different position than it would have been in each time if it had been hanging down at the side of the body in a normal way?

A. That is right.

Q. Now, why didn't you take your picture for comparative purposes with the arm hanging down at the side?

A. Because it makes no difference whether it is elevated with reference to this fragment hanging on to the humerus.

Q. What do you say is apparent about this now?

A. The fact that this fragment is displaced upwards and is united there; has nothing to do with the position of the body to the arm.

Q. If the arm were hanging straight down, though, the [fol. 92] position of this part of the bone where the fracture occurred would be in a different position on the picture, would it not?

A. Wouldn't be any difference in relation to the articulating surface position.

Q. But it would be in a different position in this plat?

A. In relation to the humerus, there would be no difference.

Q. Oh, no, but it would be in a different position on the plat; it would be shifted to our right as we look at it in the picture, would it not?

A. Yes, but that makes no difference with the attachment.

Q. I didn't ask you if it would make any difference; you said it would be in a different position.

A. Yes, sir.

Q. And that fragment of bone you say was fractured has united, has it not?

A. Yes, sir.

Q. It was not fractured through the humerus or through the whole part of the ball of the joint, or bone of the arm, or through the arm, but a sort of cap or chip off the bone, wasn't it?

A. A greater tuberosity taken off, yes, sir.

Q. What do you mean by that?

A. That is a prominence of a certain part of that bone around the head of the humerus.

Q. Well, if we were talking about, instead of bone, a stick or a log, we would refer to it as a chip off of it, wouldn't we?

A. Well, it is a good sized piece of bone; it is dug out of the bone, yes, sir.

[fol. 93] Q. And that has grown back and united?

A. Yes, sir.

Q. Is there anything in that picture to indicate any injury to the muscles of the arm or ligaments?

A. That doesn't show that.

Q. What does it show then? You say you find something wrong.

A. Because he hasn't the strength in one arm that he has in the other.

Q. And you are dependent largely upon his oral——

A. No, sir, I test from having him hold on my arms.

Q. But you could hold on mine and I could hold on more with one arm than the other, couldn't I, if I wanted to?

A. You might.

Q. Couldn't he?

A. He might.

Q. So then you are dependent in some degree on what he says or his own action in determining whether or not there has been any injury to the muscles—as to them you are dependent on what he says?

A. Yes, sir.

Mr. Mann: That is all. Now, Doctor, of course, when any bone is fractured such as this heel bone, it throws out what we laymen call a callus, which is a cement or fluid that hardens and makes new bone?

A. Throws out a callus, yes, sir, callus—it——

Q. (Interrupting:) Well, it comes out first in sort of a fluid?

A. No, sir.

Q. Well, what is it, it is not solid when it comes out?

A. It is a soft, gelatinous type of bone.

[fol. 94] Q. And that callus hardens and forms bone?

A. Yes, sir.

Q. Now, of course, for some time after there is a fracture of a bone—any bone—that callus thrown out there—take a picture of it shows more bone there than normal, doesn't it, in the picture?

A. Yes, sir.

Q. In other words, if it were——

Court (interrupting): He answered "yes, sir."

Mr. Mann: All right. Now, in time, this excess callus formation or bone largely absorbs, doesn't it?

A. Yes, sir.

Q. But it takes more than a year for that to happen, doesn't it?

A. No, sir.

Q. How long does it take it to happen?

A. It varies in different individuals.

Q. And in some individuals does it take as much as a year for the excess callus bone to form or absorb?

A. Unless there is a bone disease or something of that nature; ordinarily, it will do it in two or three months.

Q. You mean all the excess—so as to show the smooth surface on the side?

A. Yes, sir.

Q. That is not true of all persons?

A. Not all persons.

Q. It depends on the individual?

A. To a certain extent.

Q. Just like all individuals don't throw out the same quantity of this callus?

A. That is right.

[fol. 95] Q. No two patients are alike in that regard?

A. Not every case, no.

Q. Now this picture of the heel bone shows some excess callus now, doesn't it?

A. No, sir.

Q. Doesn't show any?

A. No, sir.

Q. It doesn't show any callus formation there that would interfere with the joints that may be later absorbed?

A. That shows bone.

Q. Shows bone?

A. Yes, sir.

Q. Would you say that the—you don't mean to say, do you, that the improvement of the use of the foot cannot be had by surgery?

A. The conditions as they are left there now will be permanent.

Q. If they are left there now, as they are now, they will be permanent, but couldn't surgery relieve that situation?

A. I couldn't say whether it would or not.

Q. You are not a bone specialist?

A. No, sir.

Q. You do know, Doctor, that bone specialists, men who specialize in bone surgery, orthopedic surgeons, are very often able to correct just such a situation as this?

A. Well, that would be a pretty bad one to correct.

Q. Yes, a lot of them are bad to correct; most surgery is bad, isn't it, in that——

Mr. Myres (interrupting): We object to that.

Mr. Mann:

Q. What do you mean by when you say it is "bad"—[fol. 96] just a hard case?

A. One that has been fractured to that extent and left in that condition for that length of time would be very hard to do anything with.

Q. But you are not undertaking to tell the jury that it could not be corrected or greatly improved?

A. I doubt it.

Q. You have no experience in surgery along that line?

A. Yes, sir, I had one case before this one, before I saw this one.

Q. Did you attempt any surgery along that line?

A. I attempted orthopedic surgery in that case.

Q. You don't claim to be an orthopedic surgeon?

A. No, but that didn't keep me from doing it.

Q. No, but I say you don't claim to have any special skill along that line?

A. I am satisfied with my treatments.

Q. Yes, I am satisfied you are satisfied with your treatments——

Mr. Myres: We object to that.

Court: Doctor, he is entitled to an answer to his question.

Mr. Mann: Read the last question. Question: "No, but I say, you don't claim to have any special skill along that line?"

A. Nothing more than I ordinarily perform in my practice.

Q. That is right, and your practice has been general medicine?

A. And surgery.

[fol. 97] Q. And orthopedic surgery is a separate branch of surgery, isn't it, and so recognized in the profession, isn't it?

A. They recognize it as such.

Mr. Mann: That is all.

(Witness excused.)

Plaintiff rests.

Thereupon, the defendants offered, and the court refused, the following instruction, to which action of the court in refusing to give said instruction defendants then and there excepted at the time and still except, to-wit:

INSTRUCTION "X" OFFERED BY DEFENDANTS

The court instructs the jury that under the law and plaintiff's evidence, plaintiff is not entitled to recover and your verdict must be for the defendants.

Testimony on Behalf of Defendants

A. L. FISHER testified as follows:

Direct examination.

By Mr. Mann:

I live at Enid, Oklahoma. I am in the employ of the Trustees of the Frisco Railroad as assistant superintendent and civil engineer. I am a civil engineer by profession. I

have charge of the civil engineering work down there in that territory. I have made measurements and from those measurements made a drawing showing the location of all physical structures and the track in the location where this accident occurred. The exhibit marked Plaintiff's "Exhibit [fol. 98] A" is a drawing fairly representing my scale, the track and certain physical surroundings from the Santa Fe tracks on the east or north, to and including the Walnut River Bridge, to the south. There is one heavy center line on this curve or tangent here—it is the line just below the word "To Beaumont" in the extreme right edge of the plat; that represents the center line of the main track. I haven't shown both rails of the track, I have just shown the center line. There is a line on either side with dash and dots, long and short lines, that represents the right-of-way line; that is the limit of the railroad company's right-of-way, each side of the center line of the main track. On this plat is shown a large oval there with the word "Race track" on it; that is the approximate location of the fair grounds.

Q. Now is there any difference between the width of the Frisco right-of-way opposite the race track and the other points along the track there shown in that exhibit?

A. Yes, sir.

Q. How much ground does the Frisco or the trustees own —we will call it north or upward—between the center line of the main line track and the race track, along there (indicating)?

A. Fifteen feet.

Q. And north of that point and south of that point what is the width of the right-of-way?

A. North of that point is fifty feet each side of the center [fol. 99] line of the track, and south of it fifty feet to the north, and thirty-three feet to the south.

This fifteen foot right-of-way is indicated by a change in the position in the line north of the center line of the track opposite the race track there. These little circles, just below the center line, represent the location of the telephone poles. There are thirty of them to the mile through that part of the right-of-way. They are approximately one hundred and seventy-six feet apart. The little short lines running at right angles to this heavy line, which is the center line of the main line track, indicate one hundred feet distance along the center line of the main line track. I didn't make this plat myself. I have one here that I did make that

corresponds to this, only it is on a blue print. At the intersection of the Frisco track and the Santa Fe track—A. T. and S. F. Ry.—there is a line there with MP-501 on it (referring to Exhibit A). That is mile post 501. It indicates that that point is 501 miles from Kansas City. In railroad parlance we locate various points on the railroad from these mile posts. If some point is between two mile posts we locate it by telephone poles—mile so and so plus so many telephone poles. There is a yard limit in Winfield, Kansas; we have yard limit boards and yard limits. The south yard limit south of Winfield is approximately at mile post 501 plus sixteen poles; that is, it is sixteen telephone poles south of mile post 501. It is the mark where the marker is [fol. 100] shown here "yard limit" and the post above it "MP 501" plus sixteen poles.

Q. Refer to your own blue print for comparison—see whether it is properly located on that map if you can and tell us where that yard board is located.

A. It is properly located.

Q. On "Exhibit A"?

A. Yes.

That is sixteen telephone poles from the Santa Fe tracks, sixteen telephone poles from mile post 501; the Santa Fe track is just a little further north than mile post 501. It is sixteen times one hundred and seventy-six feet from the mile post 501 to the yard limit on the south. The distance or space between that yard limit board to the north and through the station grounds of Winfield and for approximately the same distance the other side of Winfield is what we call the yard limits at Winfield.

Q. I will ask you whether the Walnut River Bridge as shown in the extreme left side of "Exhibit A" is properly located with reference to those mile posts?

A. Well, not exactly, the way the mile posts are numbered, due to the long getting over the river, there; there is a little irregularity there in the spacing of the mile posts; he did show the end of his bridge here at about——

Q. (Interrupting) That is your underpass?

A. Well, that is all one continuous bridge.

Q. Oh, that is all one continuous bridge?

A. Yes. That would be 17, 18, 19—now that is numbered [fol. 101] 20 pole at approximately the end of the bridge where he shows 19.

Q. Let me ask you then—there is a bridge over Walnut River?

A. Yes, sir.

Q. And that bridge continues north of the river down the track to and including this underpass for a highway, is it?

A. Yes, sir.

Q. It is marked on this exhibit "underpass road crossing"—that is a highway crossing under the track?

A. Yes, sir.

Q. Then that is on the Walnut River Bridge across and over the river and the underpass?

A. Yes, sir.

Q. Where is the Walnut River Bridge, the part over the river located?

A. Here at this track.

Q. What mile post is that?

A. Well, according to that plat, that is at mile 501, plus about twenty-two poles.

Q. Have you got it in feet there from the Walnut River Bridge to mile post 501?

A. Not from this plat—I can give it to you——

Q. I mean from your plat—how far it is in feet?

Court: What is that question?

Mr. Mann: The distance from the Walnut River Bridge to mile post 501.

A. It is two thousand eight hundred and twenty-seven feet.

Q. How far is the yard limit board from the Walnut [fol. 102] River Bridge, if you can just estimate it closely or take time to figure it, either one.

(Not answered.)

Q. Can you give it to us in pole lengths, how many poles is it from the Walnut River Bridge to the yard board?

A. It is approximately three poles, according to the plat here.

Q. That is, measured from the underpass, but I mean from the part over the river proper.

A. Approximately six poles.

Q. Six pole lengths. Now what is the nature of the track, is that a continuous curve from the Walnut River Bridge

down to approximately the yard limit board or approximately how far from the yard limit board does it curve and the straight track start?

A. The straight track starts approximately one pole from the yard limit board.

Q. Which direction?

A. North. That is, the straight track starts one pole south of the yard limit board.

Q. Then from that point, continuing into the curve, approximately one pole south of the yard limit board, then how much straight track is there to the north before it curves again?

A. Approximately six and a half poles.

Q. Then the track curves to the left or north does it?

A. Yes, sir.

I was there at the scene of the accident the next morning after it occurred.

Q. Was there evidence of some wreckage there to in-
[fol. 103] dicate where the accident had occurred?

A. Yes, sir.

Q. Now at what point did the collision occur?

A. Just slightly south of mile 501 plus seven poles.

Q. This "Exhibit A" is marked one pole here is marked MP-501 plus seven poles?

A. Yes, sir.

Q. Then it was just a little south of that?

A. Just a very few feet south.

Q. And how far would that be from this road crossing that is opposite the last track?

A. Approximately three telephone poles.

Q. And how far north of the south end of the curve in the track?

A. North of the south end?

Q. Yes, of the curve—where the curve proper starts.

A. Approximately two and a half telephone poles.

Q. Now, Mr. Fisher, did you go out there and by measurement locate certain trees that were along north of the right-of-way near that point?

A. Yes, sir.

Q. Did you make measurements so that you could definitely locate those trees?

A. Yes, sir.

Q. And did you put them on your own blue print?

A. Yes, sir.

Q. To scale?

A. Yes, sir.

Q. Now, I would like for you to take your pencil and make "X" marks at the location of those trees on this "Exhibit A."

[fol. 104] Mr. Myres: Just a minute, Your Honor, may I ask a qualifying question, Your Honor?

Court: Yes, sir.

Mr. Myres: Q. When did you observe these trees on the north of the track? When did you do that, Mr. Fisher?

A. I made the measurements last Friday afternoon.

Mr. Myres: Now, do you know whether or not any trees have been taken away or out of there, of your own knowledge, since this accident?

A. There was no indications I could find.

Mr. Myres: But you don't know of your own knowledge?

A. I looked purposely to see, but I couldn't find any.

Mr. Myres: Find any bushes or anything along there?

A. You mean taken out?

Mr. Myres: No, were there bushes and small shrubbery all up and down the right-of-way?

A. Not all up and down the right-of-way, no, but there were some bushes in the neighborhood of where the trees were.

Mr. Myres: All right.

Mr. Mann:

Q. You saw the trees the next day after this accident, didn't you?

A. Yes, sir.

Q. Now what do you say with reference to whether or not there has been any change between the number and location of the trees between that time and the time you made [fol. 105] your investigation last Friday?

A. There has been no change.

Q. All right, now if you will locate them, please. Now just mark on the "Exhibit A" all of the trees you found down there near the right-of-way.

A. No, sir, not here; there are smaller trees intermingled along with those, just a little underbrush.

Q. But these are the trees proper?

A. The trees of any appreciable size.

Q. You have indicated on there?

A. Yes, sir.

Between the race track and the right-of-way I have made eight cross marks, each indicating a tree.

Q. Are either of those on the railroad company's property?

A. No, sir.

Q. Then over to the right of those eight you have made one more?

A. Yes, sir.

Q. Is it on the right-of-way?

A. No, sir.

Q. Now this one that is the furtherest to the right on the exhibit, how far is it from the railroad track? Now where did you take your measurement from—from the track or the right-of-way?

A. From the center line of the track. It is forty-six and a half feet from the center line of the track.

Q. All right, the second tree or the first one to the right of the eight. Now I want the measurements of those eight [fol. 106] trees to the left. Now the first one to the right—how far is it from the main line?

A. Sixty-six feet.

Q. And the second one?

A. Sixty feet.

Q. And the third one?

A. Fifty-four feet.

Q. And the fourth one?

A. Fifty-four feet.

Q. And the fifth one?

A. Forty-four feet.

Q. And the sixth one?

A. Forty feet.

Q. And the seventh one?

A. Forty-three feet.

Q. And the eighth one?

A. Forty-five feet.

Q. Now, the north line of the right-of-way opposite those trees is how far do you say from the center line of the main track?

A. Fifteen feet.

Q. Then you have located the five over here opposite the switch track, that spur track leading up to the light plant switch?

A. Yes, sir.

Q. Are either of those five trees on the railroad company right-of-way?

A. No, sir.

Q. The one furtherest to the right of the five is how far from the center line of the track?

A. Forty-eight feet.

Q. And the next one?

A. Forty-seven feet.

Q. And the next one?

A. Forty-five feet.

Q. And the next one?

A. Fifty-eight feet.

Q. And the last one?

A. Sixty-one feet.

Q. And the right-of-way at that point is how wide, or is it the same all the way across?

A. No, it isn't the same all the way across; it starts at fifteen feet and varies up to about fifty feet.

[fol. 107] Q. Well, it is indicated by the dot and dash line which is below those trees there?

A. Yes, sir.

Q. Did I ask you—if I didn't I want to get that again—the distance from the yard limit board, mile post 501, to where you said there was the first evidence of the wreckage, how many pole lengths, is that?

A. It is approximately nine poles, but on actual measurements it is fifteen hundred and thirty feet.

Cross-examination.

By Mr. Sizer:

—. ——

—. I can't say who drew this "Exhibit A." I don't know whether he is here or not.

Q. The blue print that is now lying on the floor in front of the jury and in front of you—that was made by yourself, was it?

A. Yes, sir.

Q. When?

A. The measurements were made last Friday afternoon; the print was made yesterday.

Q. Well, and that is supposed to be the accurate one, isn't it?

A. As accurate as I could measure it.

Q. And this down here, this track here, you made last Friday, that has just only got a little segment of what you got there, isn't it?

A. I don't quite understand.

Q. Well, where is the Walnut River Bridge on this blue print here—it is laying the same direction that "Exhibit A" is.

A. 501-7, you will find it located right there.

[fol. 108] Mr. Mann: Pardon me just a minute, Mr. Sizer, I would like to offer this blue print "Exhibit 1" in evidence.

Court: Have it marked an exhibit for the defendant. Now you are offering at this time in connection with this witness' testimony "Defendants' Exhibit 1?"

Mr. Mann: Yes, sir, I am offering it.

Mr. Sizer: All right then I have no objection, Your Honor.

Court: "Defendants' Exhibit 1" is now admitted in evidence without objection.

Said "Exhibit 1" is attached following the last page of this abstract of the record.

I made this "Exhibit 1," the blue print.

Q. We are calling it the "blue print," and you made it last Friday?

A. I made the measurements last Friday.

Q. And this one next to the jury, this train line next to the jury, is that the same line as this one?

A. It is practically the same.

Q. If I turn it end for end, would this be the right-of-way?

A. Yes.

Q. This other refers to the Santa Fe here, this lower one?

A. No, sir, that is the Frisco only this is on a scale of four hundred feet to the inch, while this is on a scale one hundred feet to the inch.

Q. Both of these tracks here, so one is not the Santa Fe but they are both the Frisco railroads?

[fol. 109] A. Here is the Santa Fe represented on this map here.

Q. All right, then we will take the lower part and the lower part is this same railroad only on a bigger scale, you say?

A. On a smaller scale.

Q. Which, by the smaller scale, shows from the yard limit over to here and then you go on farther towards what then?

A. Enid.

Q. In addition to these trees, you haven't indicated or tried to indicate the number of bushes that were around these eight or nine trees within this fifty foot space from the track have you?

A. No, sir, not here, because they are more or less intermingled with them; I can tell you how much, approximately, it is.

Q. When you made this exhibit here a while back, of course, there were no leaves there at all, were there?

A. No green leaves.

Q. Some dry ones, was there?

A. Few dry leaves.

Q. You say when you got down there there was some indication of a wreck the next day; I will ask you if it isn't a fact that the wreck had been cleared up?

A. No, sir.

Q. What were they doing along there to the track?

A. Wasn't doing anything when I arrived.

Q. Was the caboose there?

A. Yes, sir.

Q. Smashed up?

A. Yes, sir.

Q. Where was it laying?

A. Oh, it was laying about opposite mile 501 plus 7 poles [fol. 110] to the north side of the track.

Q. To the north side of the track?

A. That is, the upper side on that plat.

Q. And that was off the track, but laying over, was it?

A. Yes, sir.

Q. Had they picked up the engine yet?

A. No, sir.

Q. How much salary do they pay you?

A. Three hundred and forty-two dollars a month.

Re-direct Examination by Mr. Mann.

Q. Now, Mr. Fisher, I wish you would describe what other vegetation there was of any size there, besides those trees, as it was at the time this accident occurred. You say there was some other.

A. No other vegetation up high enough to in any way interfere with any normal use or anything; of course, there

was grass and small weeds there like you would find along the right-of-way anywhere.

Q. Now that track at that point opposite those trees is how high above the ground on which the trees are located?

A. Approximately two, two and a half feet.

Q. Well, is there a dump there?

A. Yes.

Q. But that dump is about that much higher at that point?

A. Yes, sir.

EARL H. FELTON, testified as follows:

Direct examination.

By Mr. Mann:

I live at Enid, Oklahoma. I am employed as a freight [fol. 111] train brakeman by the Frisco Trustees. I have been so employed for eighteen years. I was the head brakeman on the train 630 the day of this accident, the same train Mr. Jenkins here was the fireman on. I couldn't say just exactly what time we arrived at Arkansas City; I think it was between four and—right around five. In arriving there we had come from Beaumont, going toward Enid. They turned our train there and started us back toward Beaumont.

Q. Did you and the other members of the crew, including Mr. Jenkins, eat your supper at Arkansas City that evening?

A. Yes, sir.

Q. Did you go back to your train along with them and with Mr. Jenkins?

A. I did.

Q. Together until—were you both together at the time you got down to your train?

A. We was all together until we got back down to the yard.

Q. After you got down to the yards did you see train 1229 there, the train your train later ran into?

A. 1229 was just leaving Arkansas City.

Q. When you got down——

A. To the yard.

Q. And then, I believe, you had a train order there, to wait, at Arkansas City, before leaving for Beaumont, until what time, do you recall?

A. Six-thirty.

Q. Six thirty P. M.?

A. Yes, sir.

Q. And did you wait until six thirty P. M.?

A. We did.

Q. And then your train started toward Beaumont?

A. Toward Beaumont.

[fol. 112] Q. How much of a train did you have, do you recall?

A. Well, there was, seems to me like with the coach there was thirty-four cars.

Q. You had a baggage car, baggage coach?

A. Yes, sir.

Q. And the rest of them freight cars?

A. The rest of them freight cars, yes, sir.

Leaving Arkansas City, I rode on top of the head boxcar; it was next to the engine. It is fourteen or fifteen miles from Arkansas City to Winfield.

Q. Now, before going further into that train movement—that was your regular run through there?

A. Yes, sir at the time.

Q. Tell the jury whether or not that train and other freight trains ordinarily approaching Winfield from the south take water at Winfield?

A. They always take water at Winfield, going north.

Q. And when freight trains take water there what would the trains generally do, where did they leave the train?

A. They cut off just south of the Santa Fe crossing from the train.

Q. Cut the engine off?

A. Yes, sir.

Q. And they leave the cars standing there?

A. Yes, sir.

Q. Extending in a southerly direction from the Santa Fe tracks?

A. Yes, sir.

Q. And take the engine on up to get water, I assume?

A. Yes, sir, about two blocks.

[fol. 113] Q. That place where they leave those trains—state whether or not it is in the yard limits there?

A. It is in the yard limits.

Q. Is there any railroad rule that requires the flagging of such trains or cars as are left at that point within the yard limits?

A. Not only first class trains.

Q. To protect against first class trains?

A. Yes, sir.

Q. What do you mean by "first class trains?"

A. Passenger trains.

Q. Was your train six thirty—what class?

A. Second class.

Q. Now you say that as you approached Winfield you were riding the top of the first boxcar?

A. Yes, sir.

Q. Starting back, say, at the Walnut River Bridge. Do you recall whether the engineer had made any application of the air coming through there or not?

A. On approaching the Walnut River Bridge the train began to slow down.

Q. After that did you see from your position anything of the cars, the caboose or cars of train 1229?

A. I stood up about the time I got to the yard limit board and I could see the train.

Court: What train?

A. 1229.

Q. Now what part of 1229 could you see?

A. Well, I could not see the caboose, but could see ahead, the cars ahead of it.

[fol. 114] Q. What kept you from seeing the caboose?

A. Well, there was a tree right there that blinded us from seeing the caboose.

Q. Then how could you see beyond that and see the other cars in the train ahead of the caboose?

A. Well, there was a space in there between the light plant that you look across the race track, and the curve comes around, you can see the cars up there; you can't see them all times, but you can see part of them.

Q. Now you say you first saw those cars in train 1229 when you were where with reference to the yard limit board?

A. It is about 501-16.

Q. The yard limit post is at mile post 501-16. Now where were you with reference to that yard limit board when you first saw some of the cars of train 1229?

A. I couldn't say exactly, I might have been a pole south of the yard limit board, but I can't recollect just exactly.

Q. Somewhere in that neighborhood?

A. Somewhere in that neighborhood.

Q. Now from that point, as your train moved, did you remain up on top of that car?

A. I did.

Q. From that time until—I understood you later jumped off?

A. I did.

Q. Until you jumped, were some of the cars in the train 1229 at all times within your view?

A. They were.

Q. Was the sun—had the sun set or——

A. No, the sun was shining.

[fol. 115] Q. What were the nature of the cars in train 1229 that was standing there?

A. Well, some of them had steel cars, tanks, had wheat cars, box-cars.

Q. What color were the tank cars?

A. Well, they had some of the entire tank cars aluminum color.

Q. Tell the jury whether or not the sun was shining on them?

A. Yes, sir, the sun was shining on them; you could see that, they were lighted.

Q. When you first saw those cars from your point down there near the yard limit board, what did you do?

A. I hollered.

Q. To whom?

A. At the engineer and fireman both.

Q. Was there any indication that they heard you?

A. None whatever.

Q. Do you know whether they could have heard you or did hear you from your position on top of the car?

A. I could not tell whether they could or not, but they didn't seem to show any action that they did.

Q. Did you notice their position in the cab at that time?

A. Yes, sir, I did.

Q. Now, you tell the jury what their positions were, Mr. Reece, first?

A. Well, they were sitting square in their seats just like I am setting here, and they had their heads turned just like this.

Q. Now, you mean your head is turned angling to which direction?

A. To the left.

[fol. 116] Q. To the left. Both of them?

A. Yes, sir.

Q. Where they set normally, the engineer on the right side of the cab and the fireman on the left side?

A. Yes, sir.

Q. And they were both in their seats?

A. Yes, sir.

Q. Now, how were they facing at that time?

A. When I see them they were setting straight.

Q. What do you mean?

A. Just like I am, with their heads turned to the left.

Q. Well, that would put their feet in which way from them?

A. Well, naturally their feet would be in front.

Q. With both of them with their heads turned toward the left would that make Mr. Jenkins here looking away or toward Reece?

A. Well, he couldn't be looking toward Mr. Reece with his head turned the way it was turned.

Q. Now you say they didn't give any indication to you that they had heard you?

A. No, sir.

Q. Did you call to them any more?

A. I called to them after we got down about 501-10, then the caboose showed up and I hollered, "Hey"—I didn't call their names—hollered about four times.

Q. How many times had you called to them up to that time, altogether?

A. I don't remember how many times, but I called their name and then Hollered, "Hey," three or four times up above, about the yard limit board.

[fol. 117] Q. They did nothing to indicate they did hear you?

A. No, sir.

Q. Now, during all that time, were the positions of either the engineer or Mr. Jenkins changed any?

A. I never noticed them changed, no, sir.

Q. Where were you, you say, at the time you could see the caboose?

A. Where was I or the train?

Q. Well, your place on the train?

A. I was on the head car right close to the head end of it.

Q. And about what place on the track?

A. About 501-7.
Q. Right about mile post 501-7?
A. Yes, sir.
Q. Then it was about three pole lengths from it when you saw the caboose?
A. About three pole lengths.
Q. What did you do then, you say you called to them again?
A. That is the time I hollered at them when I saw the caboose, I hollered at them.
Q. During any of that time now, had you seen Mr. Jenkins turn his head toward the engineer at any time?
A. No, sir, not any time.
Q. Then after you hollered to them at that time, what did you do?
A. Well, there wasn't nothing I could do; they didn't none of them pay me any mind.
Q. Did you at any time see Mr. Jenkins move from his [fol. 118] seat box?
A. Yes, sir, I saw him when he got off his seat box.
Q. About where was the train with reference—the engine—with reference to the caboose when he got off his seat box?
A. Well, he got off between three and four car lengths from the caboose.
Q. And you are judging car lengths at about what distance?
A. About forty feet.
Q. And just tell the jury what he did now when he got off his seat box?
A. He run straight across the deck giving this stop signs with his hands, like that (indicating), and jumped out of the deck.
Q. And what did you do?
A. Well, it was time for me to jump, too.

Court: He asked you what you did?

A. I jumped right after he did.

Mr. Mann:

Q. Did you jump from the top of this box-car?
A. I did.
Q. Which side did you jump off on?
A. On the right side.

Q. Then after you jumped, did you go to him?

A. Well, I went—after I jumped I ran until the sound of the wreck quieted down, except on the escaping steam, I went around trying to find Mr. Reece in the wreck, but I couldn't find him on the right side, so I goes around the head car and as I started to go between the car, just before I got there, I found Mr. Jenkins laying on his back.

[fol. 119] Q. On the right hand side?

A. On the right hand side, and he had, I believe it was his right leg, up like this (indicating), and said, "Call a doctor, my leg is broke." Well, there wasn't anyone on that side at all—people, you understand—I went across on the other side, and by the time I got to where the engine was, Mr. Reece was coming out, and several people run over there, and I had some men there take Mr. Reece across to an automobile, and I sent some more across to get Mr. Jenkins.

Cross-examination.

By Mr. Sizer:

Q. Been with the railroad a long time, haven't you?

A. About eighteen years.

Q. And it is the duty of a head brakeman, even when he sees anything in danger to do all he can to stop the train, isn't it?

A. Yes, sir.

Q. What kind of a car were you setting on, you say?

A. Setting on a Pennsylvania steel car.

Q. How high was it from the rails, would you say?

A. Well, I couldn't say exactly; they run twelve, fourteen feet.

Q. Now, you ran all that distance, if your story is correct, from up here at the board, when you saw it?

A. Yes, sir.

Q. And then you were looking across country over here, wasn't you?

A. I was.

Q. And you saw something way up here but couldn't tell how far down it extended, could you?

A. I could see the train down this way.

[fol. 120] Q. Well, up towards the crossing?

A. In there somewhere.

Q. In there somewhere, but you know when the engineer sets up here—you know there is a public crossing down here?

A. There is a little private crossing down there.

Q. Don't it go into here?

A. Yes, by either the light plant there or fair grounds, I don't know which.

Q. Don't know. If they say there was so powerful many people over there they have to get over somewhere—don't the road that comes across here, if this was drawn properly, this goes under this underpass here?

A. There is a highway that comes down along here.

Q. Don't it cross from this highway that comes on here, don't it cross the track?

A. No, sir.

Q. Where is the crossing that you have been referring to, then?

A. The Santa Fe crossing; there is a little private crossing that goes across right along in here somewhere (indicating).

Q. The people over whatever that crossing is, they cross over to this park, don't they, and over to this big light plant?

A. As far as I know they use it; I don't know, I hardly ever see anybody on it, it is just a private crossing.

Court: Read that question.

A. Yes, there are people that cross there; where they go I don't know.

[fol. 121] Mr. Sizer:

Q. Now if you are setting up there it is no part of your duty to look out for cars, is it?

A. I do sometimes, yes.

Q. But this time you didn't?

A. No, sir.

Q. But you do know it was the duty of the engineer and fireman to watch out when you are passing along by parks and crossings they go in and across, isn't it, their duty to be watching—whether the track is straight or not, and their duty to watch the crossing, isn't it?

A. Watch it and whistle for it.

Q. Watch it and whistle for it, and have that duty to do, don't they?

A. They do.

Q. And do you know how many trees you say along there awhile ago?

A. I didn't say how many.

Court: If he did I didn't get it.

Mr. Sizer: He mentioned trees.

Court: He hasn't testified in this court that this court heard about any number of trees.

Mr. Sizer:

Q. How many trees did you testify to awhile ago when Mr. Mann was talking to you?

A. I said there were trees; I didn't say how many.

Q. That is what I say. How many would you say were down there?

A. I do not know.

Q. But you would have to get around some trees, even though you were setting right behind the engineer and fireman there, you would have to get around there before [fol. 122] you could see the caboose, wouldn't you?

A. When I saw the caboose——

Q. (Interrupting:) Answer that question. You would have to get around the trees before you saw the caboose, wouldn't you?

A. When I got down——

Court (interrupting): No, wait a minute; if you want to make an explanation after you answer you can do that, but you must answer his question "yes" or "no," then if you want to explain you can explain.

Mr. Sizer:

Q. You would have to get around the tree before you saw the caboose, wouldn't you?

A. No.

Q. All right then. You had to pass by the view so wherever you were you would have to let your engine get clear around before your view would take in the caboose; you had to get far enough around the tree so you could see it, didn't you?

Court: Past the tree?

A. No, sir, you don't have to pass the tree.

Court: Well, you have to get around it, he is asking you.

A. No, you don't have to get around it.

Mr. Sizer:

Q. You have got eyes you can just look right through the trees?

A. No, sir.

Q. What did you say awhile ago about when you got around the trees you saw the caboose?

[fol. 123] A. The trees are still here when I come down this main line I get here I can see there, but when I am back up here I can't see there; I am not past the tree.

Q. I know, but you have got to get far enough down here to see by the tree before you can see the caboose?

A. That is correct.

Q. And the boys, you say, would have to look out on this crossing and ring the bell and when they would get down there, they wouldn't be still around the trees, would they?

A. They wouldn't be around the trees.

Q. Wouldn't be around the trees. How many would you say the trees were on the right-of-way, as you understand it?

A. I couldn't tell you whether they are on the right-of-way or not.

T. E. Kelly, testified as follows:

Direct examination.

By Mr. Mann:

I am in the employ of the Trustees of the Frisco railroad, as freight conductor, running out of Enid. I was the conductor on this train 630 on which Mr. Jenkins was the fireman the day they had a collision up near Winfield. We left that morning from Beaumont, Kansas. Our regular run on that train was from Beaumont to Enid, Oklahoma. That day we only went to Arkansas City. When we got to Arkansas City they turned us around and sent us back with the same crew.

Q. Now what time did you get into Arkansas City that afternoon?

A. Four fifty.

[fol. 124] Q. And what time did you leave Arkansas City going back to Beaumont?

A. Six thirty.

Q. Did you have supper with the crew, the other members of the crew, at Arkansas City, that evening?

A. Yes, sir.

Q. How long before you left Arkansas City?

A. Well, it was probably about thirty minutes, time we walked down, thirty, forty minutes.

Q. Was Mr. Jenkins here with you when you walked back from your supper down to the yard where your train was?

A. Yes, sir.

Q. When you got to the yard, did you see anything of train 1229?

A. Yes, train 1229 was there, making up the train, getting a caboose, I believe, but they was right there up by the "Y" switch, there.

Q. Close to your train?

A. Yes, close to our train.

Q. And did that train leave and go north soon after you got down there from your supper?

A. Pretty soon after that, yes.

Q. Was Mr. Jenkins with you when you saw the crew of that train and that train?

A. Well, they was around there some place, I don't know.

Q. After that did you get some train orders?

A. Yes.

Q. And you left?

A. Before we left.

Q. Now, what did those train orders cover—what did they provide?

A. Well, we had seven orders, I think, one of them give [fol. 125] the extra 1229 the right to run ahead of us from Arkansas City to Beaumont.

Q. It provided that it would run ahead of you?

A. Yes.

Q. And another what you call a "wait order"?

A. We had a wait order, yes.

Q. What did that wait order provide?

A. To wait at Arkansas City until six thirty P. M.

Q. That meant you couldn't leave Arkansas City before that time?

A. Yes, sir.

Q. And did you leave there at that time?

A. We did.

Q. Now what—how many cars did you have in your train?

A. Thirty four cars.

Q. Were all of those regular freight cars, what did you have?

A. Excepting two coaches, all regular freight cars, had two coaches.

Q. Where were those coaches on the train?

A. On the rear end.

Q. And where were you riding?

A. I was riding in the rear coach.

Q. Did you read those train orders over with your engineer?

A. Yes, sir.

Q. Do you know whether the fireman read them, did you see him read them—Mr. Jenkins?

A. I couldn't say.

Q. You are not required to take it up with him?

A. No.

Q. Now, going over that trip, when the train got up approaching the Walnut River Bridge, I will ask you whether [fol. 126] or not there was any reduction made in the speed of your train through there from then on or after you left over the Walnut River Bridge?

A. There was, yes.

Q. Did you have any knowledge of this collision until the impact occurred?

A. Did not, no, sir.

Q. After it occurred, what did you do?

A. The brakeman stepped into where I was; my desk is about the middle of the coach, and told me we was running into a train; I was getting ready to go over there and I got out and looked at the side of the train up there, and I see the wreck.

Q. Now where was—which coach did you get off of?

A. I got off between the coaches, that is the——

Q. Front end of the rear coach?

A. Yes, front end of the rear coach.

Q. And on which side?

A. On the fireman's side, left hand side.

Q. Now where was your coach standing then with reference to any landmark you know of there?

A. Well, the coach was about two car lengths inside the yard limit.

Q. Was a yard limit board inside the other track there?
A. Yes.
Q. And you were about two car lengths which way?
A. About two car lengths inside of it; that is, two car lengths to the north.

Court: What do you mean by "two car lengths"—what [fol. 127] distance?
A. Well, we will take that is about sixty feet because they were coaches, about two coach lengths, that would be one one hundred and twenty feet.

Mr. Mann:

Q. The ordinary car length you refer to a freight car is forty feet?
A. Yes, sir.
Q. You say these coaches were about sixty feet?
A. Yes, sir.
Q. Now when you got out of that coach to go on the north side or left hand side of the train, looking ahead, what could you see from that point?
A. I could see part of that train; I couldn't see the caboose and other, but I could see part of the train, of the one we run into, was setting up ahead of our train.
Q. Why couldn't you see the caboose? Was there any particular obstruction there to keep you from seeing that?
A. The caboose set right behind a small bunch of trees there.
Q. Then you could see the forward part of that train?
A. Yes, sir, some part of it I could.
Q. Tell the jury whether or not the sun was shining at that time.
A. The sun was shining nice and bright, and they had several "luminal" colored tanks in the train, in the extra ahead of us.
Q. What time was it when this collision occurred or when you first looked at your watch?
A. Seven ten.
Q. Then from that point, where did you go?
[fol. 128] A. I crossed right over the coach then and got in the highway and run up to the engine; there is a highway right on the east side.
Q. You went up then on the right hand side?
A. Yes, sir, went up on the right hand side.

Q. You didn't walk up the left hand side of your train?

A. No, I didn't.

Q. Now have you since that time, Mr. Kelly, ridden an engine over that track, since this accident occurred, any?

A. Yes, sir, several times.

Q. Have you made observations from that point, from that yard limit board, the south yard limit board? And between that and the place where this accident occurred, to determine whether you could see through there and see cars standing on the track between the place where this caboose was and the Santa Fe crossing?

A. I have.

Q. Tell the jury what view you have.

A. Well, I have rode the engine there several times, I have worked on the head end since that, braking up there, and rode them down for the purpose of looking at it, and you can see—oh, you can see a train at any time for thirty two car lengths, that is, some part of the train, that was ahead of us.

Q. Thirty two car lengths from where you mean?

A. From where the wreck was, thirty two car lengths south.

Q. Now where was this caboose when the wreck occurred?

A. At 501-7.

Q. Mile post 501 plus seven poles?

A. Yes, sir.

[fol. 129] Q. Now, as I understand you, when you go thirty two car lengths south of that point on the engine, you can see some part of the train, standing there.

A. You can see some part of the train.

Q. North of that point, and as you move over that thirty two car lengths from a position in the engine, is there any time that you can't see some of the cars or part of the track up there?

A. No, there is no time.

Q. To see there you look where with reference to these trees?

A. You look in west of the tracks; you look through the trees, you see, the trees are trimmed up high and that portion in there is where you have to see them.

Q. You look between those trees?

A. Yes, look between those trees.

Mr. Mann: Take the witness.

Cross-examination.

By Mr. Sizer:

Q. Now after this wreck they put you on the engineer's side to ride down there to see, did they?

A. On the engineer's side? No, sir.

Q. Put you on the fireman's side, did they?

A. Well, I have rode both sides down.

Q. Both sides?

A. Yes.

Q. Now, let's see, you, of course, riding down there just to see and observe things—have you ever ridden on the engineer's side?

A. Yes, sir.

Q. Now, under your rules, you and the engineer are responsible for the conduct of the train or the handling of [fol. 130] the train, aren't you? That is a fact?

A. Yes, sir.

Q. Now then, even where you are setting back in the coach, where you carry human beings—passengers—it is so connected up that you can pull the valve there and set the air on that train, can't you?

A. It is, yes, sir.

Q. Uh hum, so that you and the engineer are the only two that have control of the air, putting it on or stopping it, on that train, aren't you?

A. That is right.

Q. Now with your engineer and yourself responsible, haven't you ever ridden coming across this bridge in here, and if you are going to look out through the country there is a place along there that even the engineer can't see this crossing?

A. There is a little place in there the engineer could see it.

Q. Little place in there the engineer could see it?

A. Yes, sir.

Q. But you do know further, don't you, that when crossing down here it is the duty both him and his fireman, to watch him, and watch the track?

A. It is.

Q. But when you were up there in having charge of the running of the train, just for observation, you could look at the stars or the sun or any race track or anything like that and observe, couldn't you?

A. Yes, sir.
Q. But you had to be on the look-out for that, didn't you?
A. I had to be on the look-out.
[fol. 131] Q. Where is that crossing on this map?

Court: He is talking about the road crossing.
Mr. Sizer: Yes, the road crossing.

A. The road crossing is right about here——
Q. Do you know where the road crossing was?
A. Why, certainly.
Q. Yes, and you know there was one there?
A. Yes.
Q. Indicate it as near as you can, where the road crossing is.
A. Right there (indicating).

Court: Wait a minute. Having located it, stand around so the jury will see it.
Mr. Sizer: You put a mark there, will you? Where you say the road crossing is there, you think there is near where the road crossing is, isn't it? It crosses at right angles, does it? Do you know why somebody made this didn't put that crossing there?

A. Why they didn't put that crossing there?
Q. Yes, sir.
A. No, sir.
Q. And it is a public road crossing and it serves the race track, does it, and this ice plant business?
A. It does serve the race track.
Q. And everybody that crosses—what do you call this?
A. You call that west, mostly west.
Q. All right. Now, of course, you setting up and observing, you can guess across country, as you say, but the engineer and fireman coming down here, the engineer, of course, [fol. 132] on this side, with his boiler, couldn't see around as far as the fireman could see, could he?
A. No.
Q. And then it is the duty of the fireman looking out for crossings to have his eye on the crossing as things come to him, isn't it?
A. To watch for trains or anything.
Q. Yes, sir, and they do that over the crossing, people—human beings—pass over, don't they?
A. Yes, sir.

Q. And you do know that both the engineer's and fireman's duty until that crossing is past, to keep watching it, to give signals for the automobiles, and whistle, isn't it?

A. Yes. He can watch them both times the way it is set, the track down there below and the crossing, too.

Q. But this public road crossing crosses here and one of it goes this way around the trees, don't it, to this business over here?

A. Yes, goes over there to that grand stand.

Q. Around this way to the grand stand, and then it comes around this way and goes under the curve over here, don't it?

A. It does, yes, sir.

Q. So they have, under the rules of the company and their custom, they have got to watch for people coming on this crossing and coming down here, and over here, and these trees, and whistle eighty rods away and ring the bell, don't they?

A. Yes, sir.

Q. Now the fireman who has this duty—when he has all that to do, you are telling this jury, want to, that it is his [fol. 133] duty to watch for these crossings, some going on here and coming here, to give signals?

A. It is his duty to watch for all that he can.

Q. Now these trees, even at the crossing, would have kept—would have hidden the view for quite a little while, wouldn't it?

A. No, I don't believe it would.

Q. What?

A. No, sir.

Q. But he couldn't see the caboose around up here at mile post 501 or something until he could get around by these trees so his view would be unobstructed, wouldn't it?

A. He was always setting or should be at where you could see that; that takes it in, the crossing and down there, at the same view.

By the Juror: As I understand it now this highway that goes under the railroad, does it cross that track there at that race track?

Court: The witness may answer that.

A. Well, it doesn't; there is a highway now; this track that crosses there is a small road, but no highway.

Mr. Sizer: Where this other highway——

Court (interrupting): Is the juror's question fully answered?

Juror: Yes, sir.

Mr. Sizer:

Q. But this road that comes out from under here comes out comes on down this way, along the highway?

[fol. 134] A. Comes up to the edge of the right-of-way fence.

Q. All right. How far down towards this crossing?

A. It comes down, angles off right here at this—right back of that crossing.

Q. All right, but it jogs, doesn't it?

A. No, this is another little road drives in from that one.

Q. What I mean is, many people coming here, coming over to the grand stand? The only way they got to get over there at this crossing?

A. Yes, from this side, it is.

Q. Then where does it branch here?

A. Does the road branch?

Q. Yes.

A. Well, it crosses right here, just as you get over the right-of-way, it branches to the south up to the grand stand.

Q. And this is the grand stand up here?

A. Yes, sir.

Q. And it comes around, crosses here, and some way gets into this road, don't it? Did you travel it out here to see where this road went?

A. No, sir.

Q. But where this travel all comes and crosses here it is, under the rules, it is his duty to look out and to ring eighty rods, just a quarter of a mile, to ring the bell and keep the whistle sounding at intervals?

A. Yes, sir.

Q. And when you stop your train up here, your coach is about one hundred and twenty feet——

A. Yes, about that.

[fol. 135] Q. (continuing:) Down in there. And you don't have a cupola on this mixed train?

A. No, sir.

Q. But you do have your contrivance back there where anybody reports anything wrong to stop in the city limits?

A. Yes, sir.

Q. And you and the engineer, under the rules, of the company, must keep the train under such control that you

can stop it in emergency, isn't that your rule in the yard limits?

A. It is coming into the yard limits, yes, sir.

Q. I will ask you if it isn't true under rule 93, if you don't understand it is—the engineer does that to keep his train under such control that he can stop under any emergency?

A. It is.

Q. And you understand when you say it is, that it is the fireman's duty to do that?

A. It is the engineer's duty to keep the train under control.

Q. The engine man's duty to do that?

A. Yes, sir.

Q. And you and the engine man, which is the engineer, is held responsible, isn't he?

A. I guess so.

Q. Could you describe in words, or have you a copy of that rule, Mr. Kelly, which said that this 1229 extra should run ahead of you?

A. I have an order.

Q. Or copy of it, have you?

A. Yes. That one right there.

[fol. 136] Q. Now you are the one that gets the orders, and this particular order where extra 1229 was to run ahead of you was given first to you by whom?

A. By the operator.

Q. And the operator gets it from whom?

A. gets it from the dispatcher.

Q. And where is the dispatcher located?

A. At Enid, Oklahoma.

Q. And you run trains on your dispatcher's orders, don't you?

A. Yes, sir.

Q. I think you can read better than I can. Will you please read that order? You call it Number 42—so that we get it in the record.

A. Number 630 engine 1229 run extra; Arkansas City to Beaumont; extra 1229 north run ahead of 630 Arkansas City to Beaumont; signed W. R.

Q. Now, didn't you have any other order—it was to run extra ahead of you—Beaumont—it was Number 630 and 630 was your train?

A. Yes, sir.

Q. And Arkansas City to Beaumont—and didn't you have another order telling you when you could leave?

A. Yes, sir, had a wait order.

Q. Had a wait order, and that wait order determined the time when you could leave, and that would have—what was that wait order now? Will you read your wait order into the record, please, what number is it?

A. Number forty-six, Number 630 engine 1284 ——

[fol. 137] Q. That is yours, is it?

A. Yes. Wait at Arkansas City until six thirty P. M. Treshm until 6:55 P. M. for extra 1303 south. Signed W. R.

Q. Now, when you left, according to your orders there, you left how many minutes after extra 1222 went on?

Court: 1229?

Mr. Sizer: 1229.

A. About twenty minutes.

Q. About twenty minutes?

A. Yes, sir.

Q. And you understood then that that would give it time, unless it had some bad luck, etc., to precede you, along until you could wait out the time at your next station?

A. Yes, sir.

Q. And you did wait out your time at your next station?

A. Yes, sir.

Q. And under the rules that gave you——

Court (Interrupting): Under the orders.

Mr. Sizer: Under the orders they give you it should be out of your way, running as you did, shouldn't it?

A. That is it.

Q. And you got how many orders at that time?

A. Seven orders.

Q. You got seven orders?

A. Yes, sir.

Q. And you took them up there to read them over to your engineer?

A. Yes, sir.

Q. You kept seven copies and you gave him seven copies?

A. I did.

[fol. 138] Q. And so far as you are concerned, you had nothing to do with the fireman, did you?

A. No, sir.

Court: That is, nothing to do so far as delivering any of the orders to the fireman, is that what you meant?

Mr. Sizer: That is what I meant.

Court: He said "Yes, sir."

Redirect examination.

By Mr. Mann:

Q. Mr. Kelly, the wait order you got to wait at Arkansas City until six thirty was not because of the train running ahead of you, it was because of the train running towards you from the other direction?

Mr. Myres: We object to his leading.

Court: Well, he can state why they should wait, if he knows.

Mr. Mann:

Q. Do you know why the wait order was given? Did it have any relation to 1229?

A. It did not.

Q. Tell the jury what did it have reference to?

A. It give a fellow at Winfield license to come again the time that we was waiting for.

Q. It was over at Winfield?

A. Yes.

Q. Or going south?

A. Yes.

Q. And is that the one you referred to as extra?

A. 1320, yes, sir.

Q. And is that the reason your order was given?

A. Yes, sir.

[fol. 139] Q. I will ask you if it isn't a fact that at the time you got off there after this collision on the right side that there wasn't a great many people over here at this—around this fair grounds and race track?

A. Lots of people there, yes, sir.

Q. Had there been racing there earlier in the day when you passed there?

A. They had the carnival there, or racing or something, crowd of people there.

Q. You testified, in answer to Mr. Sizer's question, that there was a point some time after, I believe you said after leaving the Walnut River Bridge, or some point where the

engineer could have seen some of the cars standing between the Santa Fe track and where the caboose was. Now, where was that? Where is that? Whether you are familiar with this—here is the Walnut River Bridge shown over here and the yard limit board.

A. It was right about——

Q. (Interrupting): It wasn't down in here, was it, where the engineer could see?

A. Oh, it was over the underpass.

Q. Here is your underpass.

A. Is that the underpass?

Q. Underpass back here. The underpass is south of the yard limit, isn't it?

A. It was right about in here—two pole lengths until you come up to this underpass.

Q. You are referring to a point south of the underpass?

[fol. 140] A. I am referring to a point south of the underpass.

Q. After the train got north of the underpass then there was no place where the engineer could see it?

A. No.

Q. That is what I want to get clear.

By a Juror: May we see that, please?

Court: The jury wants to see that.

Mr. Mann:

Q. Now where is this point you say the engineer might have seen it?

Court: Put your pencil so the juror can see it.

Mr. Mann: You have made a cross there?

A. Right across down to probably there.

Q. Coming on and while on the bridge over the underpass?

A. Yes.

Q. Just to identify it, it is about two to three pole lengths north of the Walnut River channel?

A. Yes, sir.

Mr. Mann (to the jury): Does that answer the question?

Recross-examination.

By Mr. Sizer:

Q. You said something about—this happened when?

A. July 20th.

Q. You said something about the sun—what time did the accident occur?

A. Seven ten.

Q. Now, looking at this, so far as you know this would be north, wouldn't it—that arrow—if this is made correctly—that arrow would stand north?

A. Yes.

[fol. 141] Q. There is no direct west line, but imagine—where would due west be?

A. Well, I would call due west, would be right up here.

Q. This would be about west over here?

A. Yes.

Q. Yes, this would be due west. Now the sun was right close to the horizon, wasn't it?

A. It was pretty close.

Q. That is level country around there?

A. Yes.

Q. Now the sun sets at about a forty-five degree angle north of due west, doesn't it, about just that time?

A. I don't know.

Q. And don't you know as this engineer would come down or the fireman, look across here, they would be looking right into the ball or the face of the setting sun?

A. No.

Q. Where would it be?

A. Well, I haven't got it right then; I don't know the directions if that is it, because it is the west and shines down to them going a little more north there.

Q. This here turns a little back north, don't it?

A. Well, we call it north.

Q. Oh, yes, the way it runs, but I am asking you from this picture.

A. That is north (indicating).

Q. But you do know the sun sets away north of west?

A. The fair ground is right west and the sun was right over up that way.

Q. And it was low down the horizon. Well, we have got [fol. 142] an almanac on that. And you know the sun, twice a year, and March 24th, and so forth, rises directly east and sets directly west, and then it goes on and just around and comes back around there except it sets and rises straight east and west when the days and nights are equal?

A. Yes.

Q. But you didn't get out to see just where the sun was there at that time?

A. Well, I seen where the sun was, I couldn't tell just the direction or how.

Q. I know, it would, of course, shift, but to a man coming down here and making the turn, you don't know just where the sun would be?

A. The sun would be in the west.

Q. On July 20th, right in the west?

A. Right in the west.

Q. I want to ask you: About what salary they paying you?

A. About two hundred a month.

Mr. Sizer: That is all.

(Witness excused.)

By Mr. Mann:

Before I rest I want to reoffer this Plaintiff's "Exhibit A" with the notations placed on there, no question about it being in evidence, and also Defendants' "Exhibit 1," the blue print.

Mr. Myres: No objection.

Court: No objection to the understanding that Plaintiff's "Exhibit A" and Defendants' "Exhibit 1" are in evidence in their now present condition.

Defendants rest.

[fol. 143] Thereafter, on Thursday, March 17, 1938, same being the fourth judicial day of said term of said court, the following proceedings were had in said cause, to-wit:

H. T. Jenkins, plaintiff in the case, being recalled, testified as follows:

Direct examination.

By Mr. Sizer:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Who was your superintendent, Mr.—I don't recall that.

A. Mr. Wade.

Q. Superintendent of that division?

A. Yes.

Q. Was he the Wade that sat here, with Mr. Mann yesterday through this trial?

A. Yes, sir.

Q. You heard Mr.—who is your head brakeman—Fenton—testify?

A. Felton.

Q. Did Mr. Wade ever come to you for a statement?

A. He did.

Q. Where was that?

A. I gave him two; I gave him one at the hospital there, and I gave him one at his office.

Q. How long apart were they?

A. I gave him one before I left the hospital to go to St. Louis, on, I believe, it was on a Saturday night before I left there Sunday, then I stayed in St. Louis about nine, ten weeks, and I came home about in about a couple of weeks, he sent after me, he wanted another statement.

Q. That was the same Wade that was here?

A. Here.

[fol. 144] Q. Now in the first statement was there anything said or did he ask you anything about the position of Felton, the head brakeman?

Mr. Mann: We object to that, if the court please, wholly immaterial in this case; self-serving; it is not in rebuttal.

Mr. Sizer: Well, I understand—making our record. Now you tell the jury now where you last saw this man Felton?

A. Well, the other side of the Walnut River Bridge.

Q. Now tell the jury under the circumstances, tell the jury the circumstances under which you saw him.

A. Shall I explain it to him, Judge?

Court: Answer his question. Any time counsel for defendant makes an objection you stop until the court rules.

Mr. Sizer: Go ahead.

A. Over there, gentlemen, we have bad water there in that country, and I blew out the boilers often, don't you see, to keep them from foaming so. On the other side of this Walnut River Bridge, I got up to see where this brakeman was, I stood up. We set on a seat box, this way (indicating), and there is a little window right behind us here and you can't see through that window, it is smoked and black

sometimes, and I got up just this way, and looked back against my train to see where he was at, the window kind of in the north, blowing up—the foam blowing—keep it from [fol. 145], blowing this water on it, that wind gets in those cars, to keep from blowing the water back on them, and he was setting about the third or fourth car back from the engine on the turn or shoulder of the car. I just taken a glance back that way at him, and he was setting on about the third or fourth car.

Mr. Sizer:

Q. This was an oil burner, of course?

A. Yes, sir.

Q. Where else in that engine, where is his regular place to set?

A. It is a seat——

Q. When he is in back on the train?

A. There is a seat right in front of our seat box, they set up in front of us; there is a seat made, fastened to the side of the engine here with a hinge, and they fold it out when they get down, and then when they get in they raise it up and set right in front of him.

Q. Now when you go to clean out an engine or blow it out, and I think you said you had to do that that day, didn't you?

A. Yes, sir, we do it often, all the time, to keep that water down; we have bad water.

Q. And could you see him at his position when you started to blow that out, setting or looking back through this small window, could you see him at all setting down when you were setting down?

A. When I was standing up.

Court: Wait a minute, he asked you if you could see him when you were setting down.

[fol. 146] A. No, sir, I can't see him through the window setting down.

Mr. Sizer:

Q. Now when you went to look for him, you stood up, did you?

A. Yes, sir.

Q. And how far back would you say he was?

A. He was on the third or fourth car, I just looked back there.

Q. Which side was he on?

A. He was on the right hand side.

Mr. Sizer: Take the witness.

Cross-examination.

By Mr. Mann:

Q. Mr. Jenkins, you say that when you saw Felton the last time it was before you got to the Walnut River Bridge?

A. Yes, sir.

Q. About how long before?

A. Well, I didn't keep any time of it.

Q. Well, the top of the hill extends for a mile or more beyond the Walnut River Bridge, doesn't it?

A. Yes, sir.

Q. Well, is it before you came over that grade? You hadn't seen him before you came over the top of that hill, had you?

A. Yes, sir.

Q. Where was he when you saw him?

A. I saw him coming down hill there when I was blowing the boiler.

Q. Where were you with reference to the Walnut River Bridge when you last saw him?

A. I couldn't tell you how far it was from the bridge, I [fol. 147] didn't count it, but it was coming down that hill there.

Q. Now after that and before you got to the Walnut River Bridge, you never saw him any more, did you?

A. I didn't.

Q. You say he was setting down?

A. Setting down, yes, sir.

Q. On the side of the car?

A. Setting down on the side of the car up along about where the ladder is.

Q. You don't know whether he changed his position between that and the time of the collision at all, do you; you didn't look back, did you?

A. No, sir, I didn't look back, after I saw him there coming down that hill.

Q. Now as your train approached the Santa Fe crossing, if this other train hadn't been there you would have had to stop your train south of the Santa Fe tracks, wouldn't you?

Mr. Myres: We object to that, as immaterial, and calling for a conclusion of the witness.

Mr. Sizer: Gone into in direct examination.

Court: The only thing, Mr. Mann, the court doesn't quite see——

Mr. Mann (interrupting): I want to show by this witness the object of the brakeman being at the head end of this train.

Mr. Sizer: He ought to have showed that on his defense.

[fol. 148] Mr. Mann: I am showing it in contradiction of this witness' testimony.

Court: If you hadn't made the objection to the testimony offered by the plaintiff, if you want this testimony I will have to let the plaintiff put in that other testimony, or I will sustain the objection to this.

Mr. Mann: No, if it is objectionable, I won't press it.

Q. I don't understand, where you talk about this window in the back of your cab, there is no window in the back of your cab, is there?

A. There is a window right behind us just like I am setting in the seat box, there is a window right behind us.

Q. The back end of your cab is open, isn't it?

A. Over here in the gangway it is open, but where we set right up in our seat box there is a little window right behind us.

Q. Then what you call the gangway is a space between your seat and the engineer's seat?

A. Yes.

Q. Now that is all open?

A. Yes.

Mr. Mann: That is all.

Re-direct examination.

By Mr. Sizer:

Q. Man looking straight, if he is up on the first boxcar, would look straight in through the boiler car then, wouldn't he?

A. Sure he would.

Q. And would he see you if you were up on your seat box?

A. No.

[fol. 149] Mr. Mann: I object to that.

Court: Now, wait a minute, gentlemen. That answer is stricken out as a conclusion of the witness, and you are not to consider that as any evidence in this case.

Mr. Sizer: That is all.

(Witness excused.)

V. A. Sinclair, of lawful age, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Myres:

Q. State your name to the Reporter.

A. V. A. Sinclair.

Q. Where do you live, Mr. Sinclair?

A. Enid, Oklahoma.

Q. How long have you lived there?

A. Since 1903.

Q. What is your occupation?

A. Locomotive engineer.

Q. By whom are you employed?

A. St. Louis & San Francisco Railroad.

Q. And by that you mean the defendants, J. M. Kurn and John G. Lonsdale?

A. Yes, sir.

Court: The trustees?

Mr. Myres: The trustees?

A. The trustees.

Q. Of the railroad?

A. Yes, sir.

Q. Now when did you first begin to work for the Frisco Railroad?

A. June, 1903.

[fol. 150] Q. In what capacity?

A. Went to work in the shops.

Q. How long did you work there?

A. About fourteen months.

Q. Then what did you do?
A. Promoted to locomotive fireman.
Q. And how long did you work as a locomotive fireman?
A. Until 1908, I was promoted to engineer.
Q. And have you been an engineer ever since?
A. Portion of the time running and portion of the time firing.
Q. Are you now employed by the Trustees of the Frisco Railroad?
A. I am.

Court: In what capacity?

By Mr. Myres:

Q. In what capacity now?
A. At the present time I am firing.
Q. During the year 1937, did you do any running as an engineer?
A. Yes, sir.
Q. Now, Mr. Sinclair, are you familiar with the tracks from Enid to Beaumont, Kansas, Enid, Oklahoma, to Beaumont, Kansas?
A. Yes, sir.
Q. During July, 1937, were you making that run?
A. I went up there a trip or two.
Q. Did you make that run—have you made that run both as a fireman and as an engineer?
A. Yes, sir.
Q. And are you familiar with the physical surroundings of the track, the trees and the lay of the track and the [fol. 151] curve of the track in the neighborhood from the Santa Fe crossing back to the Walnut River Bridge?
A. I am.
Q. And are you familiar with the facts or with the physical facts and with the curve of the track and the lay of the track, slope of the track, the buildings on both sides—are you familiar with that, both as a fireman on the fireman's side of the engine, and also on the engineer's side of the engine?
A. Yes, sir.
Q. Now do you know Mr. Wade here?
A. Yes, sir.
Q. Do you remember the occasion when there was a wreck at Winfield, Kansas, on July 20, 1937?

A. Yes, sir.

Q. Tell the court and jury what brought that to your attention.

Mr. Mann: If the court please, I can't see this in rebuttal.

Court: Well, the court hasn't seen the relevancy of it yet; he is waiting to see whether or not it will be relevant.

Mr. Myres: What brought that to your attention?

A. Well, I don't know as I understand your question.

Q. Well, did you go to the scene of the wreck?

A. Oh, I was called with the wrecker, yes, sir.

Q. All right. Now what did your wrecker consist of—[fol. 152] who run the engine on the wrecker going up there?

A. The locomotive?

Q. Yes, sir.

A. I did.

Q. Now after you got up there were you called upon to run an engine and back your engine back to near the Walnut River Bridge and make a test as to what could be seen from the fireman's side and what could be seen from the engineer's side in proceeding north and approaching the Santa Fe crossing?

Mr. Mann: I object to that, if the court please, it is not in rebuttal of any testimony; they went into that question in chief. Properly part of their matter in chief.

Court: The theory upon which the court thinks they are undertaking to use it as rebuttal testimony is in answer to the testimony you put in where a test had been made.

Mr. Myres: Yes, sir.

Court: There was a statement on the part of the plaintiff, in chief, as to what was growing along the right-of-way, and what you could see, but they hadn't gone into the test; the objection will be overruled.

Mr. Mann: If the court please, to refresh your memory, we offered no testimony as to the test on the day this man was——

Court (interrupting): Yes, but the objection will have to be overruled.

Mr. Mann: That is true.

[fol. 153] By Mr. Myres:

Q. Now, Mr. Sinclair, I want you to tell the jury as accurately as you can, first state who was with you, and just

tell the jury what you did, on what day it was with reference to the time the wreck happened, and just tell the jury what you did up there.

A. You have reference to the test, I presume?

Q. Yes, sir, that is all we want to go in, Mr. Sinclair, is the test.

A. Backed the engine up to mile post 501, pole 21.

Q. I will have you point to the jury Plaintiff's "Exhibit A" which was introduced by the defendants; I will ask you to point on that track now to this jury, just where you backed your engine.

A. This point here (indicating).

Q. Now——

A. Neighborhood of 501-21.

Q. And why did you put your pencil on that point? Why did you designate it? What is there there?

A. There is an opening where you can see through to the Santa Fe crossing from here.

Q. On which side?

A. Engineer's side.

Q. Can the fireman see from that side?

A. He cannot.

Q. Now what is this little dotted line here, how do you know you stopped your engine right there?

A. Because I have observed that place different times.

Q. What is there there in the way of a road, if there is any?

A. The highway——

[fol. 154] Q. Is there any underpass or anything there?

A. Yes, sir, there is an underpass there.

Q. Where did you stop your engine with reference to the underpass, south or north of it?

A. South of it.

Q. Who was with you on that engine?

A. Mr. Wade and two other gentlemen.

Q. Now is that your superintendent?

A. Yes, sir.

Q. Is that the Mr. Wade that sat here at the trial yesterday all day?

A. Yes, sir.

Q. Now was he on the engine with you?

A. He was.

Q. And were the other gentlemen on the engine with you?

A. Yes, sir.

Q. Were you traveling slow?
A. We were stopped at this point.
Q. Yes, sir. Then what did you do?
A. We moved down the hill slowly.
Q. Now as you moved down the hill there, how many times, if you know, can the fireman see the boxcars over here on the track, just south of the Santa Fe crossing, if they can see them at all?
A. There would be, I would say, two places, beyond the yard limit board, which would be in the neighborhood of between pole 14 and pole 15, then down near 11.
Q. I will ask you to state to the jury if there is any other place from the time you leave where you stopped your engine south of the underpass, if there is any other places [fol. 155] that the fireman can see the box cars on the track south of the Santa Fe crossing?
A. Not—there were only two places where there is foliage on the trees; at the present time you can see all around.
Q. I mean as you made your test there the next day on July 21st, after this accident had happened on July 20th?
A. Well, my observation was on the right side of the engine on this day; I work on the north side of the engine.

Court: Wait, wait, don't tell anything except just answer the question.

Mr. Myres: I mean how many—considering the—you know the amount of foliage that was on the trees there at that time, do you?
A. Yes, sir.
Q. And considering the physical facts as they were there that day that you observed it, how many times can the fireman see across the boxcars just south of the Santa Fe crossing?

Mr. Mann: I object to that as conclusion of the witness.
Court: Well, how many did you see, if you saw any?
Mr. Myres: Yes, how many places could you see?

A. There would be two.

Court: You didn't answer the question. How many did you see?

A. I didn't see any on this day.

[fol. 156] Mr. Myres:

Q. But from your observation in making that run and considering the physical facts, as you know them to be, from the fireman's side, how many places can you see?

A. Two.

Q. Mr. Sinclair, did you come over here with the other witnesses from Enid, Oklahoma?

A. Yes, sir.

Q. And was furnished your transportation by the railroad?

A. Yes, sir.

Mr. Myres: That is all.

Cross-examination.

By Mr. Mann:

Q. Mr. Sinclair, the object of you making that test the day following this accident was because there was an Interstate Commerce Commission representative there making an investigation, wasn't it?

A. I understood such.

Q. And there was a man there, not Mr. Wade, that was making the investigation; he was the man that was making the observations.

A. The other two gentlemen seemed to be making the——

Court (interrupting): Just answer his question.

Mr. Mann: Let me ask this question. Who all was on the engine with you besides you and your fireman?

A. Mr. Wade and two other gentlemen.

Q. These other two gentlemen you understood were representatives of the Interstate Commerce Commission?

[fol. 157] A. I understood one of them was.

Q. Do you know who the other was?

A. I wasn't acquainted with him.

Q. Did you understand that the other one was an Interstate Commerce man?

A. I understood he was out of the office.

Q. Now while you say Mr. Wade was on that engine that day, it was the representative of the Interstate Commerce Commission that was making the investigation and looking to see where the view was?

A. That was my understanding.

Q. Yes. And it was the representative of the Interstate Commerce Commission who asked you — stop the engine up here about the underpass. He designated where he asked you to stop it, did he not? At the point where you say that the engineer had a view?

A. Well, I couldn't say if he were the one or whether it was Mr. Wade told me to go up there, stop at this particular point.

Q. Now at that point at the underpass, which is—you were still on part of the Walnut River Bridge at that time, weren't you?

A. Yes, sir.

Q. With your engine standing still?

A. Yes, sir.

Q. From the engineer's side you could get a glimpse of some part of the track right up close to the Santa Fe crossing?

A. Yes, sir.

Q. How close to the Santa Fe crossing?

A. Well, I couldn't answer that definitely.

[fol. 158] Q. Well, approximately?

A. Oh, I would say one hundred and seventy-five, two hundred feet.

Q. Now that is the only part of the track you could see from the engineer's side at that point?

A. Yes, sir.

Q. And you had to stop in one particular place in order to see that, you wouldn't have that view but for more than a very few feet, would you, if the train were moving?

A. No, it would be only a few feet.

Q. And after you cover that few feet, then there was never another time as your train came down past the yard limit board and down to the race track, where you could see any part of the track?

A. There was not.

Q. Now you didn't make any observations that day from the fireman's side?

A. No, sir.

Q. You were running the engine?

A. Yes, sir.

Q. Had to stay on that side. This Interstate Commerce Commission representative, though, called out on several occasions, as you came down from that and as you passed

the yard limit board, and went north, at places where he said he could see the track up toward the Santa Fe crossing?

A. Yes, sir.

Q. Now after that time—you made no observations from the left hand side that day at all?

A. No, sir.

Q. Now after that time, since July 21st, you have been [fol. 159] over that track running an engine and as an engineer and also as a fireman?

A. Yes, sir.

Q. And before there was any foliage off of these trees?

A. Yes, sir.

Q. Now from the observations you made after that time after you got south of the yard limit board, you could see portions of the track?

A. North, you mean?

Q. I mean north of the yard limit board—you say you could see portions of the track itself two different stretches of the track through there?

A. Yes, sir.

Q. From the fireman's side?

Mr. Myres: He didn't say two stretches of track, Your Honor, he said two places.

Court: Wait a minute, he already made his answer. Do you want to correct the answer you made? If he wants to correct that answer I will give him an opportunity to do so. You made an answer. Read the question and answer.

Mr. Myres: Let the record show the answer was given before the attorney could make his objection; we are objecting on the ground that the witness has not testified previously in this case there were two stretches of track.

Court: Well, the court rules that if the witness himself desires to explain or change his answer he has the opportunity to do so at this time. Is that the answer you want to remain in the record?

[fol. 160] Witness: I would like to correct it.

Court: Correct it.

A. There was not two sections of railroad, there is only one there; if that is—if I understand the question.

Mr. Mann: Well, you mean there isn't—what I intended to ask was, you testified there were two stretches of track as you crossed over, two places on the track——

Court (interrupting): Two places in this one track.

Mr. Mann: Two places in this one track, from which you could see then down toward the Santa Fe crossing.

A. My answer would be yes.

Q. Now that was when there were no cars on the track between this mile post 501-7 where you understand the caboose was?

A. Yes, sir.

Q. And the Santa Fe track?

A. Yes, sir.

Q. If there were cars upon that stretch of track they would be much more easily seen from a point just north of the yard limit board than the track itself?

Mr. Myres: Just a minute, we object to that as calling for a conclusion of the witness.

Court: Well, the facts proven are such that the jury can draw their own conclusion about that; it is a pra-tically self-evident fact. The objection is sustained.

Mr. Mann:

[fol. 161] Q. Have you been along there at that point when cars were standing between mile post 501-7 and the Santa Fe track since that time?

A. I have not.

Q. You have not when cars were standing there? Now, how far south of the yard limit board, north of the yard limit board, could you first see the track itself from the fireman's side at a point north of mile post 501-7 poles?

A. State the question again, please.

Q. It is in the testimony here that the—show you this plat—Mr. Sinclair, it is the testimony here that the south yard limit board is located at mile post 501-16?

A. Yes, sir.

Q. And you know that to be its location?

A. Yes, sir.

Q. And at that place, the next day, where you saw evidence of the wreckage of the caboose, was it right close to mile post 501-7 poles?

A. Yes, sir.

Q. Now, in your running down over that track after July 20th and before these trees had lost their foiliage, where was it—north of the yard limit board you could first see some

portions of the track itself, even though there were no cars there?

A. Between, I would say, fourteen and fifteen——

Q. (interrupting) Just a minute, let me see what you mean—you mean between 501-15 poles and 16 poles or 14 and 15 poles?

A. Yes, sir.

[fol. 162] Q. In other words, it was between the first and second poles that were north of the yard limit board?

A. Yes, sir. Then on down here about—it would be something between 11 and 12, I would say, another opening.

Q. Between poles 11 and 12?

A. Yes, sir.

Q. That would be—somewhere about the electric light plant?

A. Below that; be north of it.

Q. North of it? How far?

A. Oh, I would say about three or four poles.

Q. Well, what pole do you have in your mind that was there where you would have this view—mile post what?

A. Mile post 501, 14 to 15.

Q. Well, here would be seven here; 8, 9, 10, 11, 12, 13, 14, 15—that was your first view—now your last view was where?

A. Down between 11 and 12.

Q. Along in here (indicating)?

A. Yes, sir.

Q. You could see a considerable portion of the track north of 501-7 poles from each of those points?

A. Well, it was—you could see a portion of it south from the Santa Fe crossing, I would say, two poles.

Q. Two pole lengths?

A. Neighborhood of that.

Q. From each one of those locations?

A. Yes, sir.

Mr. Mann: That is all.

[fol. 163] Re-direct examination.

By Mr. Myres:

Q. Now, Mr. Sinclair, this last view that the fireman would have, if he was looking across here, at this track

over here, would that be with reference to a crossing there, would it be south or north of it?

A. It would be south of the crossing.

Q. And at the time that the fireman could see the last time through here, through the trees, he would be approaching your crossing where the road crosses the railroad there, wouldn't he?

A. Private crossing.

Q. Private crossing there?

A. Yes, sir.

Q. That goes into the fair grounds, around the grand stand here, and over here to this light plant—he would be approaching that, wouldn't he?

A. Well, that crossing is 501-10.

Q. And where do you say the view would be? Where would he get his view—what pole?

A. Between 11 and 12.

Q. So it wouldn't be much over two or three hundred feet——

Mr. Mann: I object to him leading the witness.

Mr. Myres: Well, I will withdraw it.

Q. Now, which way would the fireman have to be looking in order to get this view which you have testified here of the track south of the Santa Fe crossing?

A. He would have to be looking across the fair ground away from the track.

[fol. 164] Mr. Myres:

Q. If he were looking straight down the track, could he see it?

A. No, sir.

Q. One other question: The same thing would be true of the other view that he would have, wouldn't it?

A. Yes, sir.

Q. If he was looking straight down the track, he couldn't see straight down there, could he?

A. No, sir.

Re-cross examination.

By Mr. Mann:

Q. Same would be true of the engineer's view, wouldn't it?

A. Yes, sir, he would have to look across.

Re-direct examination.

By Mr. Myres:

Q. By that time, isn't it true, Mr. Sinclair, that the engineer, when he would see it, he would be looking straight ahead of his engine?

A. Well, he would look across country at the crossing because he would be going north and the crossing would be to the left of that.

Q. Yes, but isn't it true, Mr. Sinclair, that the engine is setting in a position that the nose of the engine is pointed directly toward the place where he could see through?

A. This view here—he would have a view back here on this straight track here, but he wouldn't have no view from here; he would have to look across this way.

Q. And which way would his engine be headed?

A. It would be headed north.

Mr. Myres: That is all.

[fol. 165] Re-cross examination.

By Mr. Mann:

Q. Get into the record—what do you mean by "here" and "here"—you mean when he is at the underpass looking down the track and had a view down to here, you mean down, do you?

A. About 10, yes, sir.

Q. Mile post 510?

A. Yes, sir.

Q. But to see the track north of mile post 501-7, or up here, north of the Santa Fe railroad track, his line of vision would be across this race track, wouldn't it?

A. Yes, sir.

Mr. Mann: That is all.

Re-direct examination.

By Mr. Myres:

Q. Now, in regard to the last question Mr. Mann asked you: which way would his engine be headed?

A. Be headed north.

Q. And with reference to the race track?

A. It would be south from the race track, but the engine is still headed north.

Mr. Myres: Yes. That is all.

A. (Continuing:) Or west, rather. I said south—I should correct that—it would be west.

Court: Now, you are speaking of what engine would be headed west?

A. The position the engine would be from the fair ground.

Court: All right.

Plaintiff rests in rebuttal.

Thereafter, the defendants offered, and the court refused, the following instruction, to which action of the court in [fol. 166] refusing to give said instruction defendants then and there excepted at the time and still except, to-wit:

INSTRUCTION No. "Y" OFFERED BY DEFENDANTS

The court instructs the jury that under the pleadings and all the evidence in this case, plaintiff is not entitled to recover and your verdict must be for the defendants.
(Marked: "Refused—T.W.M.")

PLAINTIFF'S GIVEN INSTRUCTIONS

Thereupon, the court, at the request of the plaintiff, and over the objection of the defendants, gave the following instructions, and to the giving of each thereof defendants then and there objected and excepted and still except, to-wit:

1

The court instructs the jury that this case is brought by the plaintiff under what is known as the Federal Employers' Liability Act, passed and approved by the Congress of the United States, governing railroads and their employees that are engaged in interstate commerce. Plaintiff alleges that on July 20, 1937, within the yard limits at Winfield, Kansas, he was injured while firing on one of defendants' engines, pulling interstate freight train No. 630, because he was forced to jump from his engine which collided with special train No. 1229.

Defendants, in their amended answer, admit that on July 20, 1937, within the yard limits of defendants' tracks at [fol. 167] Winfield, Kansas, that a freight train on which plaintiff was a locomotive fireman collided with another

of defendants' freight trains; defendants also admit that at the time of said collision, plaintiff was in the employ of the defendants as a locomotive fireman, and was, at the time, engaged along with defendants, in interstate transportation.

It is further admitted that Rules Nos. 93, 1181, 1182 and 1195 were in full force and effect at the time of the accident.

You are, therefore, instructed that if you find from the greater weight or preponderance of the testimony that plaintiff was injured at said time and place by reason of the negligence of the defendants, in whole or in part, as in other instructions hereinafter defined, and that such negligence, if any, was the direct and proximate cause of plaintiff's injuries, if any, then your verdict should be for the plaintiff.

(Marked: "Given—T.M.W.")

(Filed Mar 17 1938—Jasper Bean Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.)

2

The court instructs the jury that one ground of negligence relied on by the plaintiff is as follows:

"(d) In that said engineer in charge of said train No. 630 [fol. 168] was further negligent in that after he was notified by plaintiff that the extra train was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced plaintiff to jump from said train in order to save his life, or some bodily harm."

Therefore, if you shall believe and find from the greater weight of the testimony that the engineer in charge of train No. 630 was notified by the plaintiff that the extra train No. 1229 was standing on the main line track, ahead of them, and such notice was given in time for the engineer to make such emergency stop, then it was his duty to make such stop, if you find that the engineer understood the signal or in the exercise of ordinary care could have so understood the signal, and if you further find that he failed to do so; and forced plaintiff to jump from said engine to save his life, or bodily harm, and that such conduct on the part of the engineer, under all the facts and circumstances,

was not in the exercise of ordinary care, then the defendants were guilty of negligence.

(Given—T.W.M.)

(Filed Mar 17 1938—Jasper Bean, Circuit Clerk & Ex-Officio Recorder Dade County, Missouri.)

[fol. 169] 3

The court instructs the jury that if you shall find from the greater weight of the testimony that the defendants were guilty of negligence, in whole or in part, as in these instructions defined, which contributed to and was a direct and proximate cause of the plaintiff's injuries, if any, then your verdict should be for the plaintiff.

(Marked: "Given—T.W.M.")

Filed Mar 17 1938 Jasper Bean Circuit Clerk & Ex-Officio Recorder Dade County, Missouri.

4

The court instructs the jury that the defense of contributory negligence, as pleaded by the defendants, is an affirmative defense, and the burden is upon the defendants to show from the testimony that the plaintiff was guilty of contributory negligence, as alleged and set out in their amended answer.

And in this connection, the court further instructs you that even though you may find and believe from the greater weight of the testimony that the plaintiff was guilty of contributory negligence that directly contributed to his injuries, yet, if you further find that the defendants were also guilty of negligence, as defined in these instructions, and that such negligence, if any, directly contributed to plaintiff's injuries, then you cannot find the issues in favor [fol. 170] of the defendants on their defense of contributory negligence, but you shall reduce the amount of plaintiff's recovery, if any, in proportion as his negligence, if any, bears to the combined negligence of himself and the defendants, if any.

(Marked: "Given—T.W.M.")

(Filed Mar 17 1938—Jasper Bean, Circuit Clerk & Ex-Officio Recorder Dade County, Missouri.)

5

The court instructs the jury that by the term "ordinary care," as used in these instructions, is meant that degree

of care which an ordinarily prudent person would use under the same or similar circumstances.

That by the term "negligence," as used in these instructions, is meant the failure to use ordinary care.

(Marked: "Given—T.W.M.")

Filed Mar 17 1938 Jasper Bean Circuit Clerk & Ex-Officio Recorder Dade County, Missouri.

6

The court instructs the jury that if you find the issues for the plaintiff, you should, in assessing his damages, take into consideration the nature, character, and extent of his injuries, if any; you should also take into consideration all suffering of mind and body, if any, which you may find and believe from the evidence he has already sustained, as a direct result of said injuries, if any; you should also [fol. 171] take into consideration all suffering of mind and body which you may find from the evidence that he will sustain and endure in the future as a direct result of his injuries, if any; you should take into consideration all loss of wages you may find from the evidence that he has already sustained as a direct result of his injuries; and you should also take into consideration all loss of wages that you may believe plaintiff will sustain in the future, as a direct result of his injuries, if any; and in all, you should give plaintiff such a sum as you may believe and find from the evidence will be a fair and reasonable compensation to plaintiff for said injuries.

In this connection, you are instructed that if you find that the plaintiff was guilty of contributory negligence, as charged by the defendants, then you shall reduce the amount of his recovery in proportion as his negligence, if any, bears to the combined negligence of himself and defendants, if any.

(Marked: "Given—T.W.M.")

Filed Mar 17 1938 Jasper Bean Circuit Clerk & Ex-Officio Recorder Dade County, Missouri.

PLAINTIFF'S REFUSED INSTRUCTION

Thereafter, the plaintiff offered, and the court refused, the following instruction, to which action of the court in refusing said instruction, plaintiff then and there excepted at the time, and still excepts, to-wit:

[fol. 172] 7

The court instructs the jury that another ground of negligence relied upon by the plaintiff is as follows:

"(e) That said engineer of said train No. 630 was further negligent in that he failed to have said train under control, as he was running in the yard limits at Winfield, Kansas, in violation of Rule No. 93, requiring, under such circumstances, for the said engineer to have said train under control, so as to be prepared to stop when necessary."

Therefore, it is admitted by the defendants that train No. 630 was running in the yard limits at Winfield, Kansas, and if you further find from the greater weight of the evidence that the engineer was running said engine in said yard limits and did not have same under control so as to be prepared to stop when necessary, and if you find that such conduct on his part was not in the exercise of ordinary care, then you may find the defendants guilty of negligence.

(Marked: "Refused—T.W.M.")

Filed Mar 17 1938 Jasper Bean Circuit Clerk & Ex-Officio Recorder Dade County, Missouri.

DEFENDANTS' GIVEN INSTRUCTIONS

Thereafter, the court, at the request of the defendants, gave the following instructions on behalf of the defendants, to-wit:

[fol. 173] A.

The court instructs the jury that the charge laid by the plaintiff against the defendants in this case is one of negligence, as such negligence is defined and submitted to you in other instructions. Recovery may not be had by plaintiff on a charge of negligence, except when such charge is proven by the plaintiff by the preponderance, that is, the greater weight of the evidence, to the reasonable satisfaction of the jury.

It does not devolve upon the defendants to disprove said charge, but rather the law casts the burden of proof in reference to said charge upon the plaintiff and said charge of negligence must be sustained by the preponderance, that is, the greater weight of the credible evidence, to the satisfaction of the jury.

If, therefore, you find the evidence touching the charge of negligence against the defendants, as made in this case and submitted to you in other instructions does not preponderate in favor of the plaintiff, or is evenly balanced, then and in that case plaintiff is not entitled to recover against the defendants and you will find your verdict for the defendants.

(Marked: "Given—T.W.M.")

Filed Mar. 17, 1938, Jasper Bean Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.

[fol. 174]

B.

The court instructs the jury that there is no evidence in this case from which the jury can find that the engineer of defendants' train number 630 did not have his train under control, as required by defendants' rule number 93, after entering the yard limits of Winfield, Kansas.

(Marked: "Given—T.W.M.")

Filed Mar. 17, 1938, Jasper Bean Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.

C.

The court instructs the jury that even though you may find from the greater weight of the evidence that plaintiff called to his engineer to warn him of the presence of the standing train or cars, yet if you shall further find from the evidence that the engineer did not hear or understand said warning, if any, and that he was not negligent in failing to hear or understand said warning, and did not know of the presence of said train or cars, and was not negligent in failing to discover the presence of said train or cars, if so, in time to avert the collision then your verdict should be for the defendants.

(Marked: "Given—T.W.M.")

Filed Mar. 17, 1938, Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.

[fol. 175]

D.

The court instructs the jury that it was plaintiff's duty, as his train approached the point of collision with the other train, to be on the lookout for other trains or cars standing upon the main line rack within the yard limits at Win-

field, Kansas, and in the event he saw, or by the exercise of ordinary care, could have seen said train or cars, to warn his engineer thereof, at his first opportunity and this duty was a continuing one from the time plaintiff's said train first reach the point where, by the exercise of ordinary care on his part, he could have seen said standing train or cars.

Therefore, if you shall find from the evidence that as said train approached the standing train, plaintiff saw, or, by the exercise of ordinary care, could have seen the standing train with which his train thereafter collided, in time for him, by the exercise of ordinary care on his part, to have warned or notified the engineer of the presence of said standing train or cars, at a time when the engineer, upon receiving such warning, could have stopped or so materially reduced the speed of the train as to have averted the collision and all injury to plaintiff and that plaintiff negligently failed so to do, then you are instructed that the plaintiff was guilty of contributory negligence.

(Marked: "Given—T.W.M.")

Filed Mar. 17, 1938, Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.

[fol. 176] DEFENDANTS' REFUSED INSTRUCTIONS.

Thereafter, the defendants offered, and the court refused the following instructions, to which action of the court in refusing said instructions, and each of them, defendants then and there excepted at the time and still except, to-wit:

E.

The court instructs the jury, as a matter of law, that plaintiff violated defendants' rule number 93, and because of his violation thereof, is not entitled to recover in this case and your verdict must be for defendant.

(Marked: "Refused—T.W.M.")

Filed Mar. 17, 1938, Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.

F.

The court instructs the jury that it is admitted by both plaintiff and defendants that the collision in question occurred within what is termed the yard limits at Winfield, Kansas. You are instructed the under defendants' rule number 93, offered in evidence and admitted by both plain-

tiff and defendants to have been in force, it was the duty of the plaintiff to be on the lookout for trains or cars standing upon the main line track within said yard limits, and if he saw, or by the exercise of ordinary care could have seen the train or cars with which his train later collided, to notify his engineer thereof, and if you shall find and believe from the evidence that the engineer's view of such standing [fol. 177] train or cars was obstructed and he could not see the same as his train approached said train or cars and that the plaintiff knew, or by the exercise of ordinary care should have know that the engineer could not see and did not know of the presence of said standing train or cars, if you so find, and if you shall further find and believe from the evidence that the plaintiff either saw, or, by the exercise of ordinary care on his part, could have seen the standing train or cars with which his train later collided, in time for him to have warned or notfied his engineer of the presence of said *said* train or cars and at a time when, had he so warned his engineer, the engineer, by the exercise of ordinary care on his part, could have averted the collision with said standing train or cars and that plaintiff negligently failed so to do, then you are instructed that plaintiff cannot recover in this case and your verdict must be for the defendants, even though you may find and believe from the evidence that the defendants were also guilty of negligence, as such negligence is defined in these instructions.

(Marked: "Refused—T.W.M.")

Filed Mar. 17, 1938, Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.

Afterwards, on the 17th day of March, 1938, same being the fourth judicial day of said term of said court, the jury returned into court the following verdict, to-wit:

[fol. 178] VERDICT.

"We the jury find the issues for the plaintiff and assess his damages at the sum of ($12,000) twelve thousand dollars.

J. A. Piddock, Foreman."

(Filed Mar. 17, Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri.)

JUDGMENT.

Afterwards, on the same day last aforesaid, the court rendered and entered judgment upon said verdict, which judgment is regular in form.

Afterwards, within four days from the rendition of said judgment, and during the same term, to-wit, on the 17th day of March, last aforesaid, defendants filed motion for new trial, which is as follows (omitting caption):

MOTION FOR NEW TRIAL.

"Come now the defendants and move the court to set aside the verdict and finding of the jury and grant defendants a new trial in the above entitled cause, for the following reasons:

First: Because the court erred in refusing to give defendants' requested instruction in the nature of a demurrer to the evidence, offered at the close of the evidence on the part of the plaintiff.

Second: Because the court erred in refusing to give defendants' requested instruction in the nature of a demurrer to the evidence offered at the close of all the evidence in the case.

Third: Because the court erred in admitting incompetent, irrelevant, immaterial, improper and inadmissible evidence [fol. 179] on the part of the plaintiff, over the objection of the defendants.

Fourth: Because the court erred in excluding proper, competent and relevant evidence offered by defendants.

Fifth: Because the court erred in giving instructions numbered one, two, three, four, five and six, and each and every of them, as requested by plaintiff, over the objection and exception of defendants.

Sixth: Because the court erred in refusing to give instructions lettered E, F, X and Y, and each and every of them, as requested by defendants.

Seventh: Because the verdict is excessive in amount.

Eighth: Because the verdict is so excessive in amount as to show, upon its face, that it is the result of passion and

prejudice of the jury against these defendants and in favor of this plaintiff.

Ninth: Because the verdict is against the evidence and against the weight of the evidence.

Tenth: Because, under the pleadings and all the evidence, the verdict should have been for defendants.

(Signed) Mann, Mann, & Miller, Attorneys for Defendants."

Marked: "Filed Mar. 17, 1938. Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri."

[fol. 180] MOTION FOR NEW TRIAL OVERRULED.

Thereafter, on the 18 day of March, 1938, same being the * * * judicial day of said term of said court, said motion for new trial having been seen, heard and fully understood by the court, was by the court overruled, to which action of the court in overruling said motion for new trial defendants then and there objected and excepted at the time.

Thereafter, on the same day last aforesaid and during the same term of said court, defendants filed affidavit for appeal, same being as follows (omitting caption):

AFFIDAVIT FOR APPEAL.

"On this day personally appeared before me, the undersigned Clerk of the Circuit Court, within and for Dade County, Missouri, J. R. Schweitzer, who, being first duly sworn upon his oath says that he is attorney and agent for the defendants in the above entitled cause, and that, as such, is authorized to and does make this affidavit in their behalf.

Affiant further states that the appeal prayed for by the defendants is not made for vexation or delay but because affiant believes defendants are aggrieved by the judgment or decision of the court.

(Signed) J. R. Schweitzer.

Subscribed and sworn to before me this the 18th day of March, 1938.

Jasper Bean, Clerk of the Circuit Court of Dade County, Missouri. (Seal.)

[fols. 181-182] Filed Mar. 18, 1938. Jasper Bean, Circuit Clerk & Ex-Officio Recorder, Dade County, Missouri."

Appeal Granted.

Thereupon, on said day last aforesaid, and during said term, the court, after having seen said affidavit so filed by the defendants granted defendants an appeal to the Supreme Court of the State of Missouri and an order entered extending time for filing bill of exceptions until on or before the first day of the next regular term of this court.

Order Settling Bill of Exceptions.

Now come defendants and present to the court bill of exceptions within the time allowed by law, and pray the court that same may be signed, sealed, filed and made a part of the record herein and, same having been seen and approved by the court, it is ordered by the court that the same be signed, sealed, filed and made a part of the record herein as the bill of exceptions in this case.

Done at Lamar, Missouri, this 1st day of November, 1939.

Thos. W. Martin, Judge of the Twenty-sixth Judicial Circuit of Missouri.

Filed Nov. 3, 1939. Henry Hughes, Circuit Clerk, Dade County, Mo.

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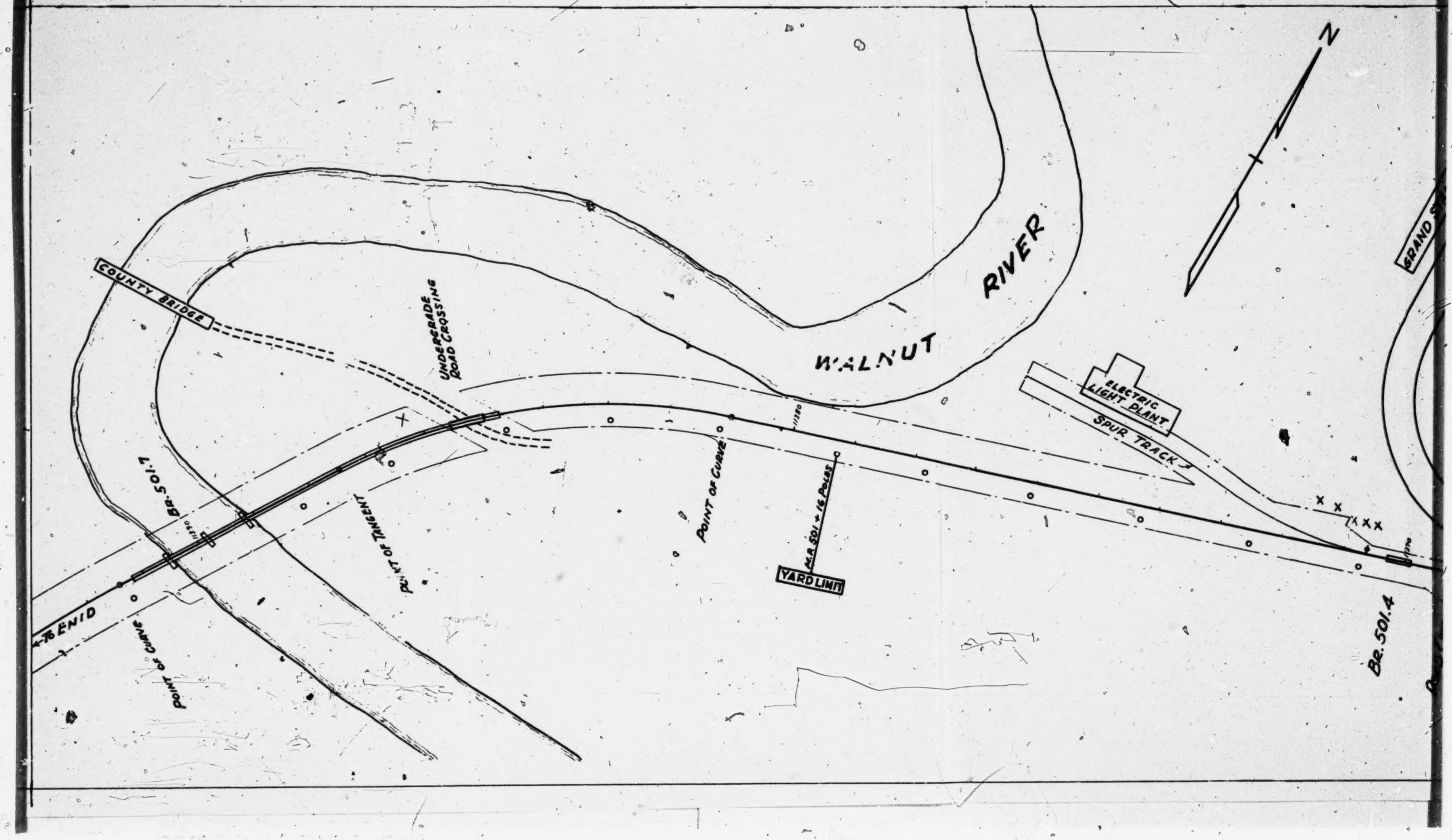
EXHIBIT "A"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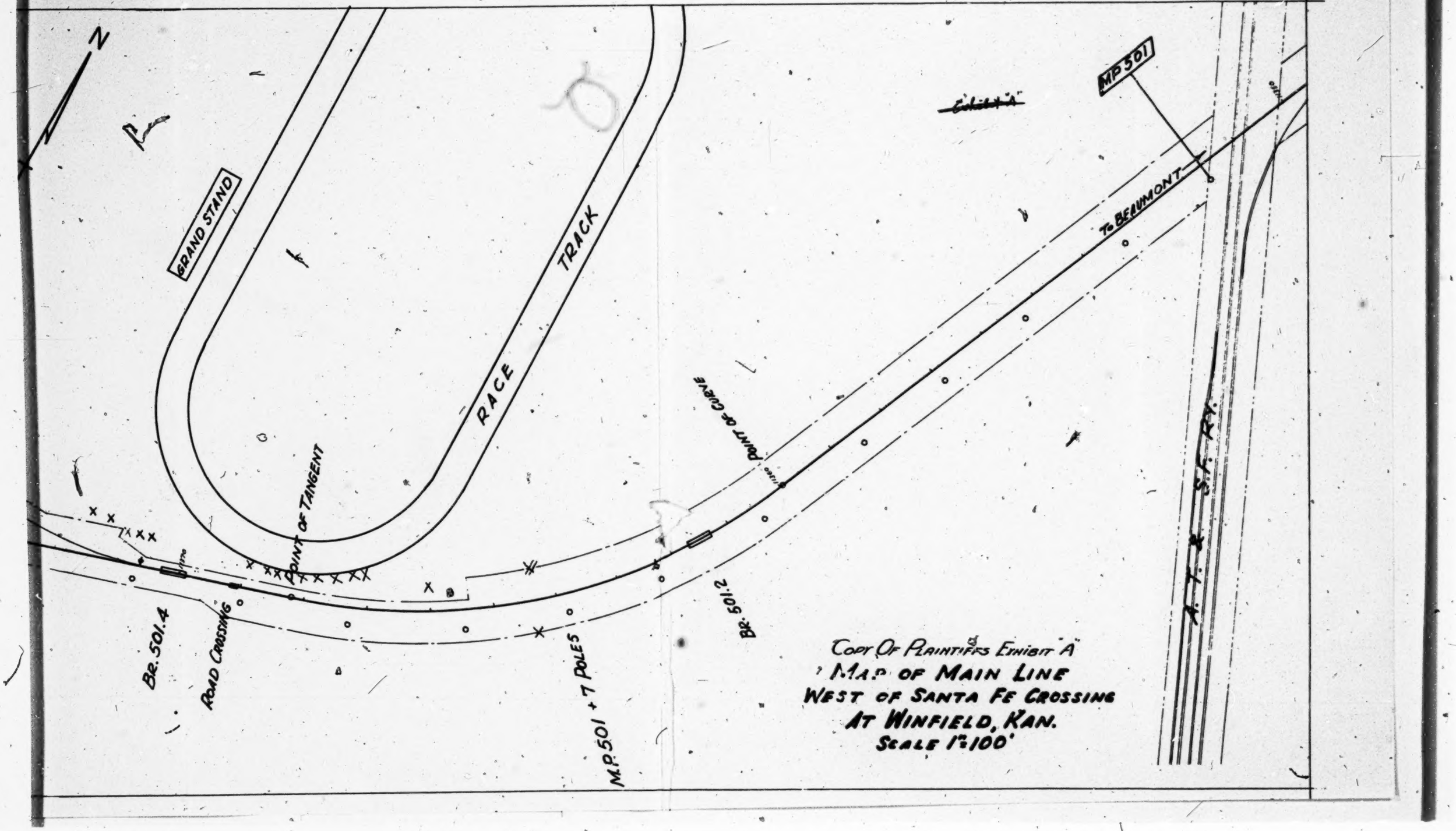
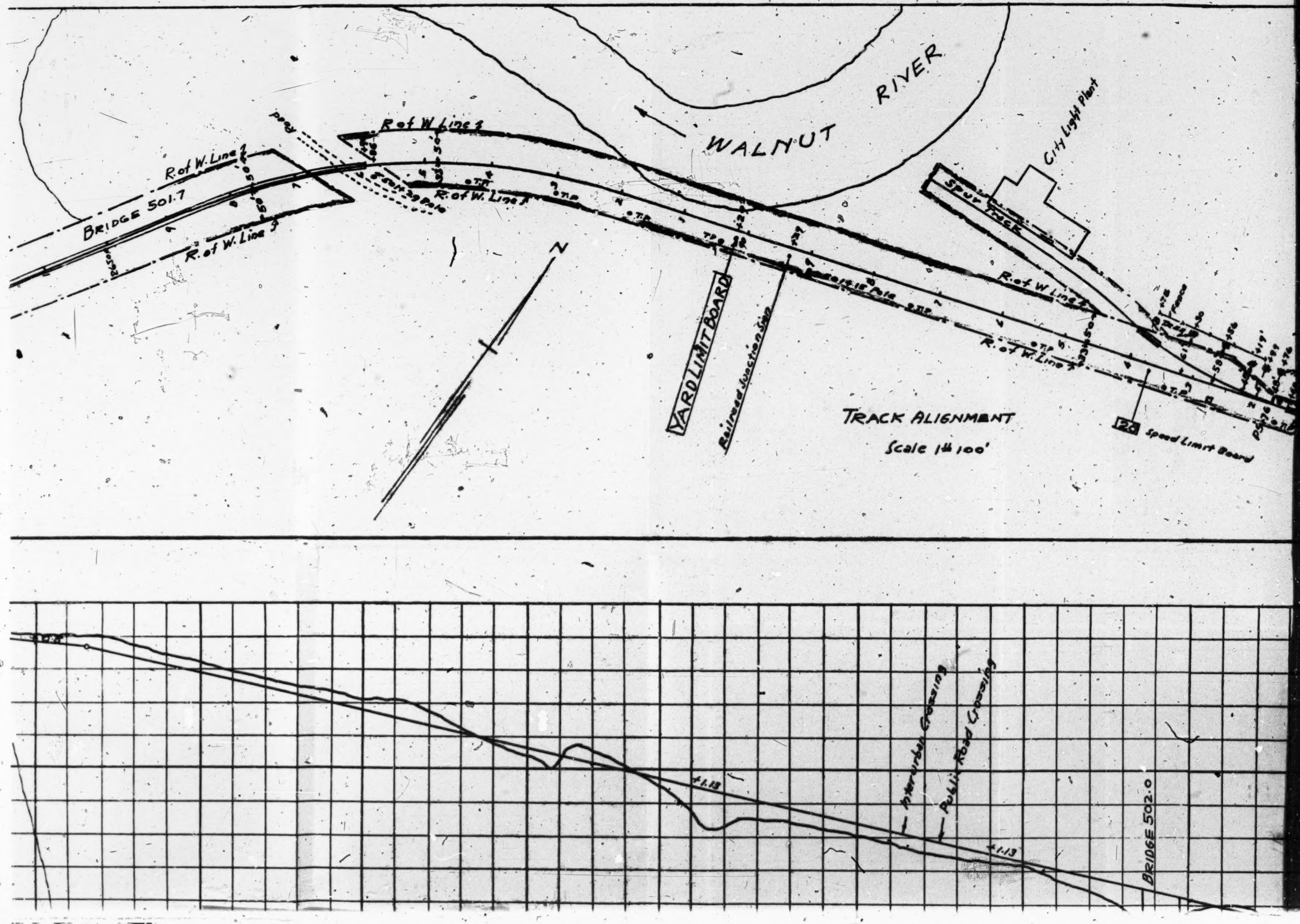
WALNUT RIVER
COUNTY BRIDGE
UNDERGRADE ROAD CROSSING
ELECTRIC LIGHT PLANT
SPUR TRACK
GRAND ST
TO ENID
POINT OF CURVE
POINT OF TANGENT
POINT OF CURVE
M.P. 501 + 16 POLES
YARD LIMIT
Br. 501.7
Br. 501.4

EXHIBIT "A"



Copy Of Plaintiffs Exhibit "A"
MAP OF MAIN LINE
WEST OF SANTA FE CROSSING
AT WINFIELD, KAN.
SCALE 1" = 100'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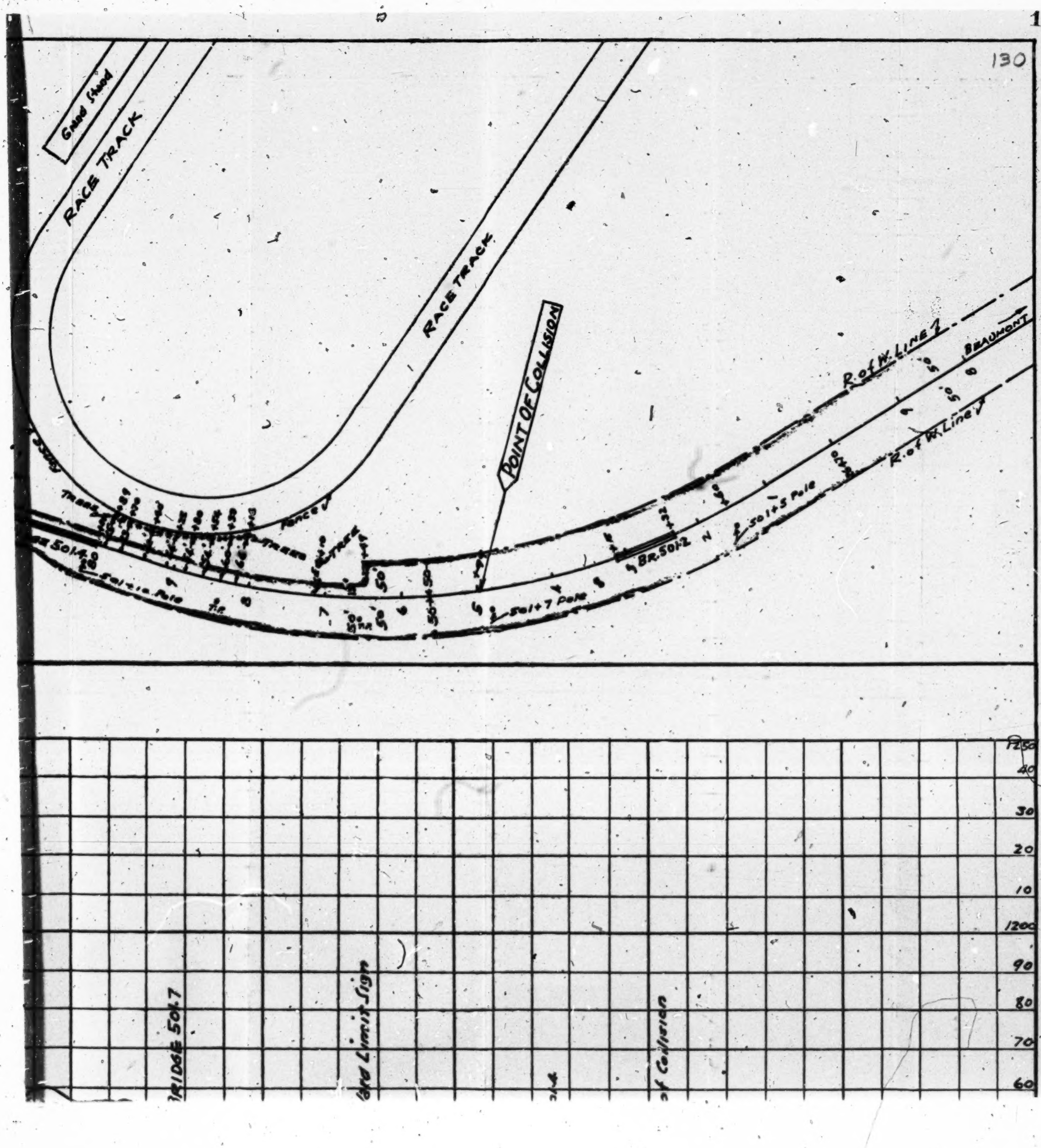
City Light Plant
Spur Track
R. of W. Line
BRIDGE 501.7
Post
Fence
YARD LIMIT BOARD
Railroad Junction Sign
TRACK ALIGNMENT
Scale 1" = 100'
20 Speed Limit Board
Interurban Crossing
Public Road Crossing
BRIDGE 502.0
+1.13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Guard Shed
RACE TRACK
RACE TRACK
RACE TRACK
POINT OF COLLISION
R. of W. LINE
BEAUMONT
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Sta 501+5 Pole
BR. 501+2 N
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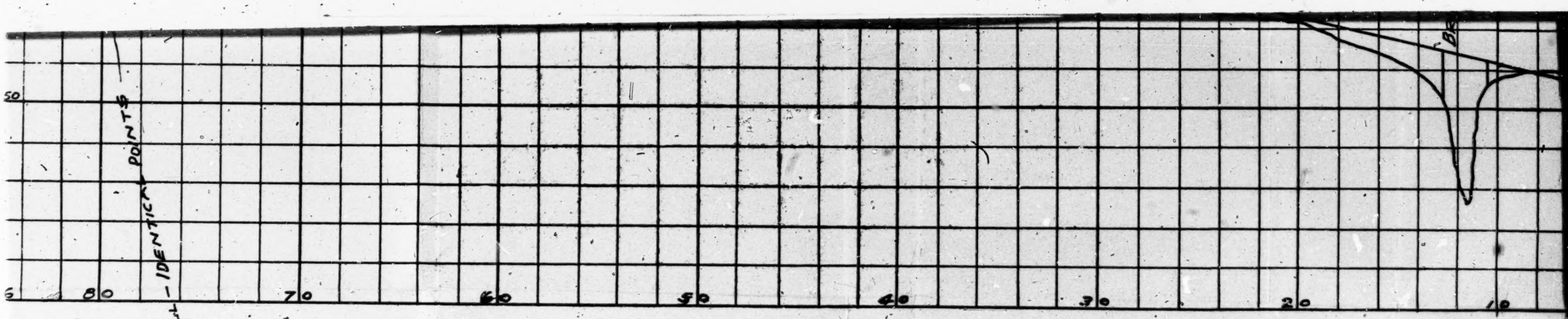
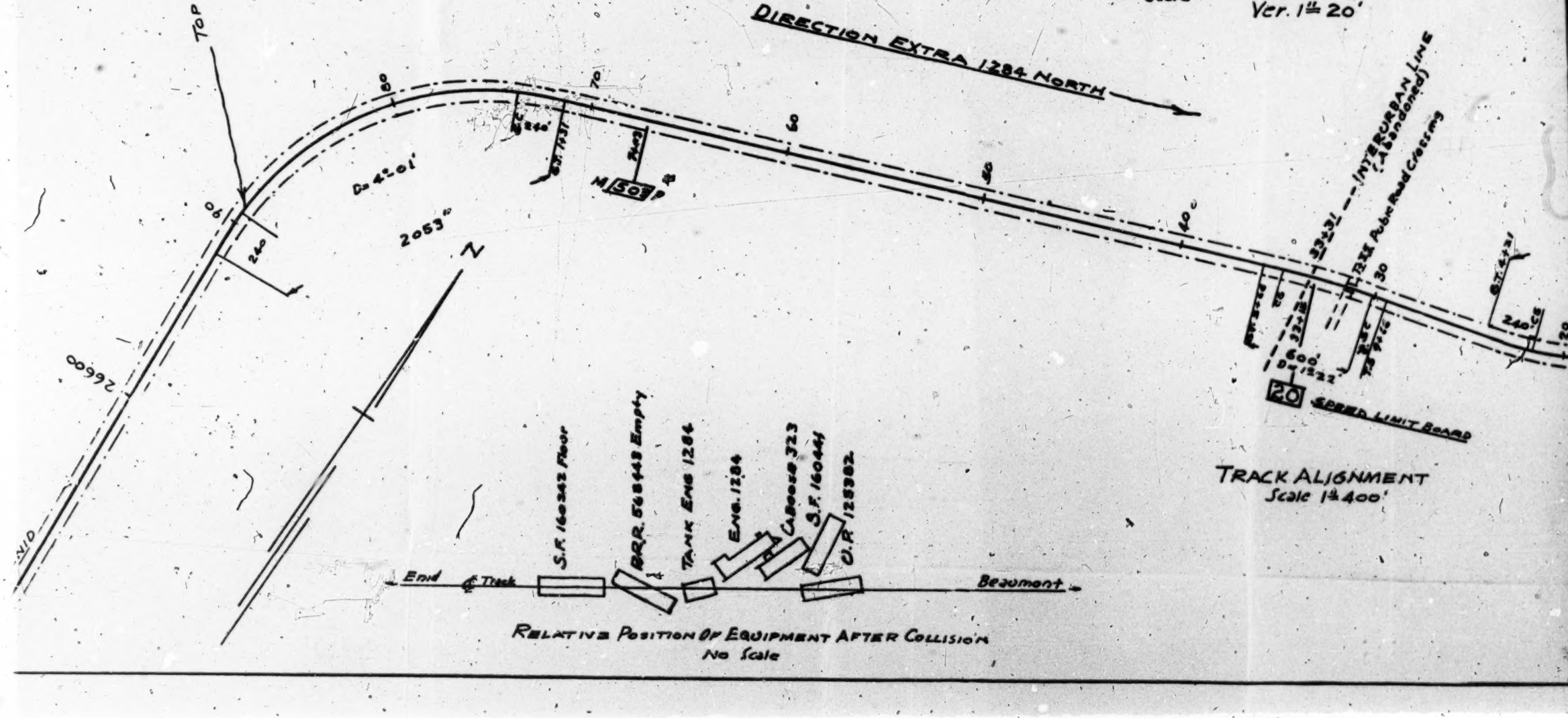
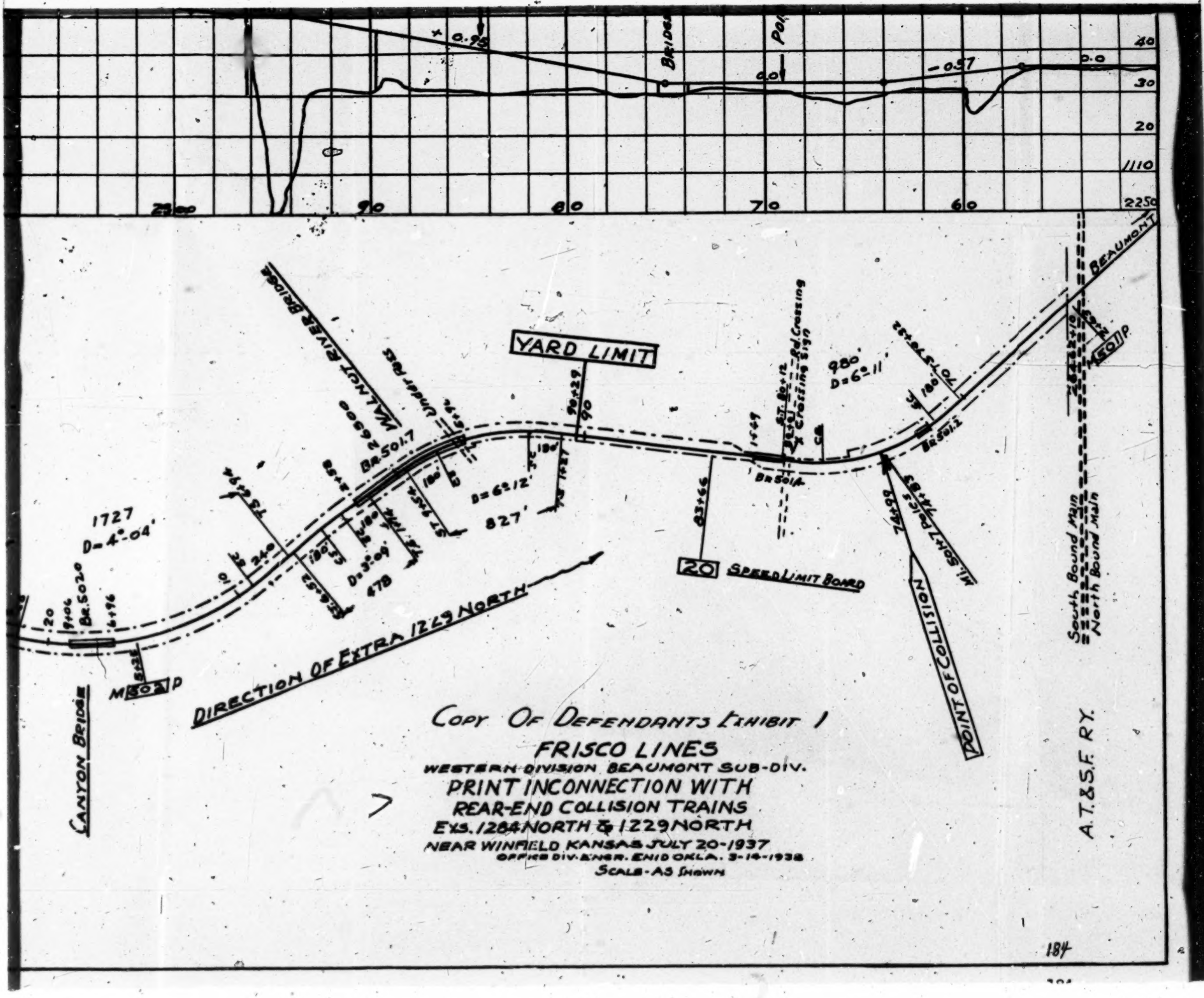


TRACK PROFILE
Scale Hor. 1" = 400'
Ver. 1" = 20'



RELATIVE POSITION OF EQUIPMENT AFTER COLLISION
No Scale

TRACK ALIGNMENT
Scale 1" = 400'



COPY OF DEFENDANTS EXHIBIT 1

FRISCO LINES

WESTERN DIVISION BEAUMONT SUB-DIV.

PRINT INCONNECTION WITH

REAR-END COLLISION TRAINS

EXS. 1284 NORTH & 1229 NORTH

NEAR WINFIELD KANSAS JULY 20-1937

OFFICE DIV. ENGR. ENID OKLA. 3-14-1938

SCALE-AS SHOWN

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[fol. 185] And thereafter and on the 19th day of January, 1940, the following proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. Jenkins, Resp.,

vs.

J. M. Kurn et al., Apps.

Come now the parties, by their respective attorneys, and submit this cause to the Court on briefs.

And thereafter and on the 7th day of May, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

H. J. Jenkins, Respondent,

vs.

J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, a Corporation, Appellants

Appeal From the Circuit Court of Dade County

Now at this day come again the parties, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Dade County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of said judgment; and that the said appellants recover against the said respondent their costs and charges herein expended, and have execution therefor. (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

[fol. 186] IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, MAY TERM, 1940

No. 36,340

H. J. JENKINS, Respondent,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees of the St. Louis-San Francisco Railway Company, Appellants

This is an action under the Federal Employers Liability Act (45 U. S. C. A. 51 et seq.) to recover for injuries received when plaintiff, a locomotive fireman, jumped from a moving freight train. The jury returned a verdict in favor of plaintiff for $12,000; motion for a new trial was overruled and defendants appealed.

It is conceded that the cause is properly under the Federal Employers Liability Act. Plaintiff resided at Enid, Oklahoma, and his run was from Enid to Beaumont, Kansas. July 20, 1937, plaintiff was fireman on a northbound mixed train, No. 630, consisting of 32 freight cars and two coaches. The crew consisted of the conductor, engineer, fireman, and two brakemen. Plaintiff jumped from his engine and was injured in the railroad yards at Winfield, Kansas, about 7:10 p. m. Train No. 630 left Arkansas City, Kansas, 14 miles south of Winfield, about 30 minutes behind freight train No. 1229, and plaintiff knew this. The Santa Fe [fol. 187] crosses the Frisco at Winfield, and No. 1229 stopped in the yards at Winfield, and south (we may say) of the Santa Fe tracks. The engine was cut loose and moved over north of the Santa Fe tracks to get water. The freight cars and caboose, belonging to 1229, were left on the main track, and train No. 630 ran into the caboose. The engineer of 630 was killed and plaintiff, as stated, jumped from the engine and was injured.

Plaintiff alleged five grounds of negligence, but the cause went to the jury on the charge that the engineer on No. 630 was negligent "in that after he was notified by plaintiff that the extra train (No. 1229) was standing on said track * * * he failed to immediately apply the air in the emergency to stop said train, which negligence * * * forced

plaintiff to jump from said train in order to save his life or some bodily harm." The answer, except admissions, was a general denial, contributory negligence, and assumption of risk. The reply was a general denial.

Error is assigned (1) on the refusal, at the close of the case, of a demurrer to the evidence; (2) on given and refused instructions; and (3) on an alleged excessive verdict.

Throughout the trial the track, upon which the collision occurred, was referred to, for the most part, as extending north and south. According to plats in evidence, this was not accurate, but it will be more convenient to assume that the track so extended. The track crosses Walnut river about 2500 feet south of the point of collision, and from the river to the Santa Fe crossing (about 1200 feet north of the point of collision), the track is, in form, a reverse S curve. Between the river bridge and the point of collision, west side, were a light plant and a race track. Also, there were [fol. 188] several trees along the way, on the west side, and especially in the area between the race track and the railroad track. There was a public road crossing about 500 feet south of the point of collision, and the collision point was at or near the easternmost extension of the second curve of the reverse S.

According to the evidence, the speed of the train, from the river bridge, was about 6 miles per hour. The engineer, from his side (right), could not see train No. 1229, especially after train No. 630 entered upon the second curve of the reverse S, and plaintiff testified that he looked all the time straight up the track, and that, because of the first curve, and the obstructions west of the track, he did not see train No. 1229 until within 10 or 15 car lengths (400 to 600 feet) of it. He testified that he first saw the caboose of train No. 1229 when his engine was at or near the public road crossing, which, as stated, is about 500 feet south of the point of collision.

With some omissions and a few supplied words, plaintiff's evidence may be stated as follows: "When I came around there and got away from those trees where I could see around the curve, I saw the caboose, and I then hollered to him (engineer) to push that brake valve over in emergency; that the train was down there in front of us. When you yell to an engineer to pull the brake valve over, that means danger, and to stop. I yelled loud at the engineer.

Q. Did he hear you?

A. Well, he looked around; he didn't do anything. He looked like he thought I was joking with him or something (this statement stricken). He turned around and looked at me, but he did not throw on the brake valve, and made no effort to do so.

Q. What did you do after you yelled at him?

[fol. 189] A. I got down off my seat box and went on his side; we were drifting on down towards the caboose; I was kind of waiting on him to see what he was going to do.

—. From the time you yelled, how far did you travel until the engineer put on the brake valve?

A. Well, we was about, when I got down, when we had traveled down the distance within two or three cars, the best I can judge, we got in about two or three cars of the caboose, and I started—I went around in the gangway behind him, and started down on the steps, and he pulled the brake valve over in emergency and I went on down the steps and jumped off.

Q. Tell me how many car lengths you traveled from the time you gave the signal to throw the brake valve in until you jumped, until the engineer did put on the brake valve?

A. Well, I judge that was ten or fifteen cars from where I saw it there to the caboose; looked to me like it was about two or three cars down to the caboose when I jumped off."

Cross examination:

"Q. Now you say that when you first saw the caboose you were about at the road crossing or ten or fifteen car lengths from the caboose, what did you do then, when you first saw it?

A. I hollered for the engineer to pull the brake valve over in emergency.

Q. You don't know whether or not he heard you?

A. He looked around, but didn't say anything, and didn't do anything, and I didn't say anything more.

Q. Except for looking toward you, he did nothing or said nothing to indicate he understood what you were telling him.

A. No.

Q. What had you told him?

A. I told him to pull the brake valve over in emergency, that a train was standing down there in front of us.

Q. Then when he didn't do it, you tell us that you sat there on your seat box until you got down to within about three car lengths of the other train?

[fol. 190] A. No, I didn't say that.

Q. Well, when did you get off your seat box?

A. When I told him that, I got down off the seat box, and went over on his side; of course, we were going down about a car length or more and I got off my seat box and went over on his side.

Q. The first time you said anything to him you were ten or fifteen car lengths from the caboose?

A. Yes.

Q. Then you say that he didn't do anything except look toward you and then you got down off the seat box and went over to his side, now how far had your train moved before you got down off your seat box?

A. I suppose moved down about a car length maybe, something like that.

Q. About forty feet?

A. Something like that.

Q. Then what did you do?

A. I kept waiting for him to do something, kept drifting on down there and he didn't do anything.

Q. Is that all you did, just stood there, waiting for him to do something?

A. I got down about two or three cars of the caboose and went in behind him, got in the gangway, and about that time he pulled the brake valve over in emergency, and about that time I got down on the bottom step and jumped off.

Q. I want to see if I understand you. Where did you go after you had only moved a car length, you say you got off your seat box, what did you do?

A. I was down in the deck and I went over toward him.

Q. He hadn't done anything and you didn't say anything more to him?

A. No, sir.

Q. Now, you never spoke to the engineer or hollered to him except the one time when you were on your seat box ten or fifteen car lengths from the caboose, that was the only time you had ever spoke to him about it, you have already testified you never said another word to him.

A. No.

Q. And you stood right there behind him while he ran from nine or fourteen car lengths from the caboose down to about three car lengths of the caboose, didn't you?

[fol. 191] A. Yes, sir.

Q. And without ever saying a word to him?

A. Yes.

Q. And during that time you knew he couldn't see that caboose, didn't you?

A. He could see it up to two or three cars when I jumped off.

Q. That isn't what I am asking you. From the time you got down in the gangway up to the time you got ready to jump, you knew his view of the caboose and the rest of the cars, of that train, was obstructed?

A. Yes, he couldn't see it; when I jumped off, he could see it, though.

Court: He means before that.

A. No, not before that.

Counsel:

Q. Before that he couldn't see it?

A. No.

Q. You didn't do anything except that first holler to give him any warning at all, did you?

A. That is all I did.

Q. Did you make any motions with your hands when you did that?

A. Well, I don't think I made any motions with my hands, I just hollered to him."

Plaintiff testified that the noise of the train did not prevent conversation between him and the engineer when sitting on their respective seats.

Earl H. Felton, head brakeman, testified that, from Arkansas City, he rode "close to the head end" on top of the box car next to the engine; that he saw the caboose of train 1229, and hollered at plaintiff and the engineer, but was unable to attract their attention; that both had "their heads turned to the left" (there was a carnival going on at the race track); that plaintiff got off his seat box "between three and four car lengths from the caboose" and ran "straight across the deck giving this stop signs with his hands like that (indicating) and jumped out of the deck.

• • • I jumped right after he did." Plaintiff testified that when the train was south, probably a mile, of Walnut river, Felton was riding on the third or fourth car back from the engine.

[fol. 192] The reasons assigned to support the contention that plaintiff did not make a submissible case are that the petition wholly fails to state a cause of action; that there is no substantial evidence that plaintiff gave the engineer a timely warning of the danger; and that plaintiff assumed the risk. Plaintiff's case was submitted on the theory that the engineer failed to exercise ordinary care to stop after notice by plaintiff of the danger ahead. In the situation, the decisive question on the demurrer to the evidence is: Is there substantial evidence that plaintiff notified the engineer to go into emergency? It was possible for plaintiff's conduct to have been as he testified after he "hollered for the engineer to pull the brake valve over in emergency", but such conduct would certainly not be expected in the usual course. "But the province of the jury to pass on the facts must not be invaded, and however improbable the testimony of the witness who testifies to a fact not in itself impossible may appear in the ordinary course of events its credibility is for the jury." 64 C. J. 357, Sec. 344; Hardin v. Illinois Central R. Co., 334 Mo. 1169, 70 S. W. (2d) 1075, l. c. 1079. See also Weaver v. Mobile & Ohio R. Co., 343 Mo. 223, 120 S. W. (2d) 1105. In ruling the questions presented we shall take it that plaintiff used language which if understood would have advised the engineer of the danger when the engine was 10 or 15 car lengths south of the point of collision. The burden was on plaintiff to establish that he notified the engineer to go into emergency. He did not so notify him unless the engineer understood what was said, and there is not even a scintilla of evidence that the engineer understood what plaintiff said. It is conceded that the engi-

[fol. 193] neer could not see train No. 1229 when train 630 was at the public road crossing, or 10 car lengths away or 15 car lengths away, and plaintiff said that he knew this. We think the most favorable evidence for plaintiff would be to say that when train No. 630 was 10 car lengths (400 feet) from the caboose of train 1229, he used the language he says he did about notifying the engineer to go into emergency, and that he did not jump until within 2 car lengths (80 feet) of the caboose. Under this hypothesis, the train moved 320 feet from the time plaintiff says that he notified the engineer

before he (plaintiff) jumped. The speed of the train was 6 miles per hour or approximately 9 feet per second. On this basis 35 seconds elapsed from the time plaintiff says that he "hollered for the engineer to pull the brake valve over in emergency", until he, plaintiff, jumped, and all this time the engineer, although in the very jaws of death, did nothing except to turn around and look at plaintiff. Every word of plaintiff's evidence, on the point, tends to show that the engineer did not understand what plaintiff said. If the engineer understood what plaintiff said, then there can be no explanation for his failure to act, except that he was determined on suicide. However, there is a presumption against suicide [Hatchett v. United Rys. Co. (Mo. Sup.) 175 S. W. 878; Flynn v. Kansas City, etc. R. Co., 78 Mo. 195; Newell v. Boatmen's Bank, 279 Mo. 663, 216 S. W. 918; Andrus v. Business Men's Acc. Ass'n., 283 Mo. 442, 223 S. W. 70, 13 A. L. R. 779], hence there can be nothing in the record tending in the least to show that the engineer understood.

[fol. 194] It will not be necessary to rule other questions. The judgment should be reversed and it is so ordered.

John H. Bradley, Commissioner, Hyde, C. Concurs; Dalton, C. Concurs.

Per Curiam: The foregoing opinion by Bradley, C., is adopted as the opinion of the Court. All the Judges concur.

[fol. 195] And thereafter and on the 17th day of May, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. Jenkins, Resp.,

vs.

J. M. Kurn, et al., Apps.

Comes now respondent, by attorney, and files herein a motion for rehearing.

Which said motion for rehearing is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, MAY TERM, 1940

No. 36340

H. J. JENKINS, Respondent,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees of the St. Louis, San Francisco Ry. Co., Appellants

Respondent's Preliminary Motion for Rehearing

Now comes the respondent herein and moves the court to grant him a rehearing in this cause for the following reasons, to-wit:

(1) Because the opinion of this court in this cause fails to consider the testimony in the most favorable light to the plaintiff, contrary to the established law as represented by the cases of this court.

(2) Because the opinion of this court fails to consider the negligence of the defendant's engineer in not making [fol. 196] further inquiry upon hearing the plaintiff's warning if he did not understand the same.

(3) Because the opinion of the court in reaching its conclusions fails to examine the testimony and give the plaintiff the benefit of the most favorable inferences therefrom as has long been the rule of this court and our appellate courts as prescribed in their cases.

(4) Because the opinion of the court invades the province of the jury.

(5) Because the opinion of the court fails to recognize the long established doctrine of "Acts in Emergency" which is an important factor in this case and the plaintiff is entitled to the benefit thereof.

(6) Because the court's opinion herein is in conflict with applicable statutes and controlling decisions in that the respondent's warning was sufficient to constitute a compliance with any rule and that any failure to repeat such warning could only constitute contributory negligence.

(7) Because the opinion in this case reverses this case outright without a consideration by the court of the erro-

neous action of the trial court in refusing to permit the respondent to submit this cause to the jury on other grounds of negligence.

(8) Because the decision in this case places the respondent and all others similarly situated in the position of being the insurers of the "understanding" of a fellow servant, contrary to the established law in this state, both statutory and by decision.

(9) Because the established law in this state requires only that the respondent should have given the engineer a warning such as a reasonably prudent person would have understood; but the decision in this case places a far greater [fol. 197] burden on the respondent, to-wit, the burden of establishing or proving that the engineer understood or comprehended the warning.

(10) Because this case was submitted by both parties in the trial court upon the theory that the respondent had discharged his obligation under the law if a warning was given which would have placed a reasonably prudent person on guard under all of the facts and circumstances of this case.

(11) Because the opinion and decision of the court implies and requires a construction of the term "to notify" which is contrary to the established law of this state, as guaranteeing understanding or comprehension.

The motion for rehearing should be sustained.

Respectfully submitted, Sizer & Myers, H. G. Waltner, Jr.

And thereafter and on the 1st day of June, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. JENKINS, Resp.,

vs.

J. M. KURN, et al., Apps.

Comes now the respondent, by attorney, and after obtaining leave of court, files a supplemental motion for rehearing and suggestions in support.

Which supplemental motion for rehearing and suggestions in support are in words and figures following, to-wit:

[fol. 198] IN THE SUPREME COURT OF MISSOURI, DIVISION No. 1, MAY TERM, 1940

No. 36340

H. J. JENKINS, Respondent

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees, Appellants

RESPONDENT'S SUPPLEMENTAL MOTION FOR REHEARING

Comes now the respondent herein, and within the time allowed by order of this court extending the time for the filing of respondent's motion for re-hearing to June 1, 1940, and supplements the preliminary motion for re-hearing heretofore filed in this cause, with the following grounds and reasons for the consideration of this court as the basis for granting to respondent herein a re-hearing in this cause:

I

The opinion of the court in this case is in conflict with ruling decisions of this court in that it fails to consider the testimony in the most favorable light to the plaintiff, and to give to plaintiff the most favorable inferences that can be reasonably drawn therefrom.

II

The court in its opinion has overlooked the point that in the trial of this case in the lower court, the defendant [fol. 199] instructed the jury and thus tried the case in the trial court on the theory that plaintiff was entitled to recover upon proof of negligence on the part of the engineer "in failing to hear or understand" the warning, and by such action, the opinion and decision is contrary to the decisions of this court in such cases as Taylor vs. C. C. & St. Louis Ry. Co., 63 S. W. (2d) 69, 333 Mo. 650.

III

The court, by its opinion, holds that plaintiff is not entitled to recover any sum because the notice, warning, state-

ment, signal or whatever it may be called, was not understood by defendant's engineer. In so holding, the Legal effect thereof is to determine that such failure constituted primary negligence resulting from violation of company rules, preventing recovery. In so holding, the opinion of the court is in conflict with controlling decisions of this court, such as follows:

Wilson vs. Chicago B. & Q. Ry. Co., 296 S. W. 1017, 317 Mo. 647;

Brock vs. Mobile & Ohio Ry. Co., 51 S. W. (2d) 100, 330 Mo. 918;

Good vs. Missouri, Kansas & Texas Ry. Co., 97 S. W. (2d) 612, 339 Mo. 330.

and of the Supreme Court of the United States, such as follows:

Rocco vs. Lehigh Valley Ry. Co., 288 U. S. 275; 53 S. Ct. 343, 77 L. Ed. 743;

Union Pacific R. R. Co. vs. Hadley, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

IV

The opinion in this case requires any employee required under the company's rules to give a signal, warning or [fol. 200] notice to guarantee the understanding of the person to whom the statement or signal is directed. This is contrary to all authority on the subject and conflicts with many decisions of this court, such as:

Peppers vs. St. Louis-San Francisco Ry. Co., 295 S. W. 757.

V

The opinion and decision of the court is based upon an unreasonable and unduly technical construction of the term "to notify," and does not construe that term in its usual and ordinary sense in view of the relation of the term to the rest of the instruction, and in so doing is contrary to decisions of this court, such as:

State ex rel. Ambrose vs. Trimble, 304 Mo. 533, 263 S. W. 840, Cert. den. 267 U. S. 598, 69 L. Ed. 806, 45 S. Ct. 354.

VI

If no satisfactory relief can be granted pursuant to the preceding propositions, the opinion should be modified to the extent of remanding the cause for further procedure, and in failing so to provide, the opinion conflicts with the opinion of this court in such cases as Finnegan vs. Mo. Pac. R. Co., 149 S. W. 612; 244 Mo. 608.

Wherefore, in view of the foregoing reasons, respondent respectfully prays this court that his motion for re-hearing should be granted, and that the respondent be given an opportunity to present to this court the several valid and efficient reasons why respondent is entitled to an affirmance of the judgment of the trial court in his favor.

Respectfully submitted, Harry G. Waltner, Jr., Sizer & Myers, Attorneys for Respondent.

[fol. 201] IN THE SUPREME COURT OF MISSOURI, DIVISION No. 1

May Term, 1940

No. 36340

H. J. JENKINS, Respondent

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees, Appellants

RESPONDENT'S SUGGESTIONS IN SUPPORT OF THE PRELIMINARY AND SUPPLEMENTAL MOTIONS FOR RE-HEARING

Plaintiff brought an action under the Federal Employer's Liability Act to recover damages for injuries received when plaintiff, a locomotive fireman, jumped from a moving freight train which immediately thereafter crashed into the rear end of another of defendant's freight trains, killing the engineer. The case went to the jury on an allegation of negligence on the part of the defendant in that the engineer failed to apply the brakes and stop the train after being told by the fireman that the train was immediately ahead and that the emergency brake should be put on.

The court found that whether or not the fireman made the statement was a jury question, passed on favorably to plaintiff, and that the words used were sufficient to advise the engineer of the danger, but that because the engineer "did not understand," the judgment was reversed outright.

Respondent respectfully suggests that there is no basis for the decision which has been rendered, and respectfully requests that the court grant a re-hearing in this cause.

[fol. 202] I

The opinion of the court in this case is in conflict with ruling decisions of this court in that it fails to consider the testimony in the most favorable light to the plaintiff, and to give to plaintiff the most favorable inferences that can be reasonably drawn therefrom.

A fair reading of the opinion of the court in this case indicates that it is concluded that a substantial period of time elapsed between the time the plaintiff warned the engineer and the time of the collision, during which the engineer should have acted indicating an understanding or comprehension of the order. This conclusion is reached from a mathematical calculation based upon a supposed train speed of six miles per hour and an estimated travelled distance of three hundred and twenty feet from the time of the warning until plaintiff jumped. May we urge this court to reconsider the facts as they appear in this record in light of the following factors:

In the opinion, it assumes that plaintiff did not jump until he was within two car lengths of the caboose. His testimony indicates that he jumped when he was "two or three cars" from the caboose (R. 73, 74). Likewise, he estimated that he first sighted the caboose and called his warning to the engineer when "ten or fifteen car lengths from the caboose," (R. 71, 74). Also, that it was "something like" a car length after he called his warning that he got down off his seat to go across the gangway (R. 72, 73).

The testimony in respect to the speed of the train being six miles per hour was in all cases given in respect to the location of the train clear back on the Walnut River Bridge, almost one-half mile from the site of the collision. From defendant's Exhibit "1" it will be noted that the grade

of the track is consistently and almost acutely downgrade for two and one-quarter miles south of the point of colli- [fol. 203] sion. It will be noted that this grade averaged better than one per centum according to the Exhibit. Also, in the cross-examination of the plaintiff by defendant's counsel, it is brought out that the top of the hill extends for one mile or more beyond or south of the Walnut River Bridge (R. 146).

We desire to emphasize to the court that the testimony in respect to distances is all mere estimates. As such, they are susceptible of interpretation by the jury and the court should be very hesitant to withdraw the case from the jury on the basis of such factors.

In the case of Wise vs. Chicago, Rock Island & P. Ry. Co., 76 S. W. (2d) 118, 122, 335 Mo. 1168, is found the following:

"The testimony of the witnesses as to distances and speed were at best merely estimates the accuracy or inaccuracy of which might well be argued to the jury, but they are hardly susceptible of an interpretation that would justify taking the case from the jury."

If, however, this court does not feel that it was proper for the jury to pass upon this issue without a scrutinizing review by this court on appeal, we believe that the court should take into consideration the reasonable inferences which can be fairly drawn from this testimony.

First, the distance travelled between the time plaintiff got down off his box and jumped from the engine was but six car lengths. This is arrived at by using the original figure of ten car lengths, subtracting therefrom the one car length estimated to have passed before plaintiff got down off of his box, minus an additional three car lengths, which was the distance to the caboose at the time he jumped. Six times forty, the estimated length of a car, equals but 240 feet as the distance traversed, rather than 320 feet. [fol. 204] We respectfully assert that it is reasonable to infer that the train had gained substantial additional speed during the one-half mile which travelled from the Walnut River Bridge to the point of collision, or the point at which the brakes were applied. It should be remembered that the testimony indicated that the train proceeded to coast from the Walnut River Bridge north without any air being ap-

plied to the brakes (R. 34). Taking into consideration the momentum which this train would naturally acquire, we cannot consent to use the figure of six miles per hour as being the speed at which the train travelled the 240 feet between the time plaintiff warned the engineer and got down off his seatbox, and the time that he jumped from the engine.

May we suggest to the court that it would not be unreasonable or an unwarranted assumption to base the calculation upon a greater speed. Thus, for example, if twelve miles per hour rather than six miles per hour were used, the train would have travelled eighteen feet per second rather than nine feet per second, and therefore required but thirteen seconds, rather than thirty-five seconds, to travel the distance of but 240 feet.

Also, in the opinion it is stated that during this period the engineer did nothing. This overlooks the specific and very enlightening testimony of the plaintiff to the effect that plaintiff looked like he thought plaintiff was joking. It is difficult, if not impossible, to explain what caused the engineer to act as he did, but most certainly, in view of the evident situation, this statement of the appearance of the engineer was entirely proper, and as a statement of fact, the [fol. 205] appearance of the engineer definitely is a factor which this court should consider in its most favorable light from plaintiff's standpoint. The testimony that plaintiff turned his head, proved beyond doubt that the engineer heard the warning. The indication, by facial expression, of disbelief appearing on the engineer's face, definitely proved an understanding of the warning. This factor is entirely absent from the court's analysis of evidence most favorable to plaintiff and constitutes a serious omission.

Under these circumstances, the situation presented is materially changed, and we believe thoroughly justifies the court in leaving to the jury the determination of the issues in the case.

We respectfully suggest that a review of this record on the basis of the evidence most favorable to the plaintiff, together with reasonable inferences that can fairly be drawn therefrom, indicate that this is definitely a jury question and should be so recognized by the court.

[fol. 206] II

The court in its opinion has overlooked the point that in the trial of this case in the lower court, the defendant in-

structed the jury and thus tried the case in the trial court on the theory that plaintiff was entitled to recover upon proof of negligence on the part of the engineer *"in failing to hear or understand"* the warning, and by such action, the opinion and decision is contrary to the decisions of this court in such cases as Taylor vs. C. C. & St. Louis Ry. Co., 63 S. W. (2d) 69, 333 Mo. 650.

The opinion in this case holds, and the decision is based entirely upon the proposition, that plaintiff was required to prove the engineer "understood" the warning. In so doing, the court overlooked the issue of negligence on the part of the engineer in failing to understand the warning. Under Instruction "C" (R. 174) given by the defendant, this issue was directly presented to the jury. By this instruction, one of the possible findings of the jury was as follows:

"The court instructs the jury that even though you may find from the greater weight of the evidence that the plaintiff called to his engineer to warn him * * * yet if you * * * find * * * the engineer did not * * * understand said warning, *and* that he was *not negligent in failing* to * * * understand said warning * * *, then your verdict should be for the defendant."

Under this instruction, the jury, at the defendant's direction, was authorized to take into consideration the issue of a negligent failure to understand. Under defendant's own theory of defense, upon which this case was tried in the trial court, plaintiff made a case if the engineer was negligent "in failing to hear or understand." No contention was made that there was no evidence in the record bearing on this point. Indeed, the testimony of plaintiff that the engineer's hearing was normal (R. 76) and that an ordinary conversation could be easily carried on in the engine cab (R. 76, 78) was not denied, although the defendant endeavored to show that at the time the warning was given, there might [fol. 207] have been an unusual noise in the cab because of the operation of the injector (R. 79, 80). Thus we see that the defendant joined with plaintiff on the issue of fact as well as in the Instructions requested and given. Under these circumstances, defendant is in no position to complain of a verdict which the jury may have brought in, based upon his Instructions authorizing and finding for plaintiff,

if the engineer was negligent "in failing to hear or understand" the warning.

Defendant, in a brief filed in this case, has argued strenuously that in instructing the jury on the question of negligence of the engineer in failing to hear or understand the warning, that plaintiff went beyond the pleadings in the case. Even if this were the case, which plaintiff denies, such error would likewise be concurred in by the joining of defendant with plaintiff in the submission of the issue to the jury in the Instructions, which was done on the same theory.

In the case of Taylor vs. Cleveland C. C. C. & St. Louis Ry. Co., 63 S. W. (2d) 69, 333 Mo. 650, this court had before it the validity of the contention of the defendant that the use of the word "unnecessary" in the plaintiff's Instruction "broadened the issues presented by the petition." In examining into this allegation, this court found that both the plaintiff and defendant had asked Instructions on that theory and held (S. W. 75):

"So that, if there was error in plaintiff's instructions in this respect, and we think there was not, defendant's instructions and the whole theory of its defense contained the same vice. It is too well settled to require citation of authorities that a party will not be heard to complain of alleged error in which, by his own conduct at the trial, he joined or acquiesced."

[fol. 208] Again, this court en banc in the case of Cole vs. St. Louis-San Francisco Ry. Co., 61 S. W. (2d) 344, had for consideration a contention made by the defendant that plaintiff's Instruction was erroneous because authorizing a verdict if oil was found on the ladder of the car from which plaintiff fell, "before the train left Pensacola." In reply thereto, Judge Gantt, speaking for the court, stated (S. W. 347):

"It argues that the oil may have been placed on the ladder, as it was inspected before the car left said station. If it was in error to so instruct the jury, defendant is in no position to complain. Instructions given at its request also required a finding that oil was on the ladder 'before the train left Pensacola'."

We also call the court's attention to the case of Blankenship vs. St. Louis Public Service Company, 71 S. W. (2d)

723, — Mo. —, wherein it was determined that the joining of issues by Instructions, even though defendant's Instructions were the converse of plaintiff's Instructions, prevented the defendant from contending that there was no evidence upon which the issue could be based (S. W. 727).

It therefore must be acknowledged that this cause was tried out on the facts and submitted to the jury by both plaintiff and defendant on the theory that plaintiff was entitled to recover upon proof of negligence on the part of the engineer "in failing to hear or understand" the warning. Such being the case, the parties must present the case to this court on that theory and are entitled to receive a decision of the court on that theory. Fowlkes vs. Fleming, 17 S. W. (2d) 511, 322 Mo. 718, 732.

A decision of this court which omits and ignores this issue cannot be sustained and should be re-considered.

[fol. 209] III

The court, by its opinion, holds that plaintiff is not entitled to recover any sum because the notice, warning, statement, signal or whatever it may be called, was not understood by defendant's engineer. In so holding, the legal effect thereof is to determine that such failure constituted primary negligence resulting from violation of company rules, preventing recovery. In so holding, the opinion of the court is in conflict with controlling decisions of this court, such as follows:

Wilson vs. Chicago B. & Q. Ry. Co., 296 S. W. 1017, 317 Mo. 647;

Brock vs. Mobile & Ohio Ry. Co., 51 S. W. (2d) 100, 330 Mo. 918;

Good vs. Missouri, Kansas & Texas Ry. Co., 97 S. W. (2d) 612, 339 Mo. 330.

and of the Supreme Court of the United States, such as follows:

Rocco vs. Lehigh Valley Ry. Co., 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743;

Union Pacific R. R. Co. vs. Hadley, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

Plaintiff has elsewhere earnestly contended that plaintiff is not the guarantor of the engineer's understanding or

hearing, that the opinion herein is in error in holding that because there was no "understanding" on the part of the engineer of the notice, signal, warning, statement, or whatever it may be called, plaintiff failed to "notify" defendant's engineer of the danger, and therefore plaintiff was barred. Without in any way retracting that contention, plaintiff respectfully urges that even if the burden is on plaintiff to "notify" to the extent of guaranteeing an understanding, that plaintiff at least partially discharged his obligation and the failure to give a "complete" notification to the extent of guaranteeing an understanding can be no more than contributory negligence, reducing, but not precluding, a recovery.

[fol. 210] The court's opinion determines that the notice, statement or warning of the engineer by plaintiff was incomplete, and therefore plaintiff is guilty of primary negligence, which was of such character that it prevented any recovery whatsoever.

This follows from the fact that it was the theory in the trial court, recognized by instructions for both parties, that if the negligence of plaintiff was equal to or greater than the negligence of the defendant, no recovery could be had, and if this opinion is not to be so construed, then that issue is an open one and must be determined by the court. A fair reading of the opinion is susceptible to no other construction but that the learned Commissioner first determined that under the Frese, Kennedy and Caldine cases, a failure to notify or warn absolutely precluded recovery by plaintiff rather than constituted contributory negligence, that there was no distinction in law between an incomplete warning and no warning at all, and then proceeded from that point to find and determine that the notification or warning was not sufficient and therefore no recovery at all is permissible. We therefore urge that this decision is contrary to controlling cases of this court and of the Supreme Court of the United states on this particular point. The defendant in its brief has called to the court's attention the foremost cases wherein it was determined that a violation of a rule constituted sole proximate cause of the injuries, totally defeating the right to recovery. These cases are as follows:

Frese vs. Chicago B. & Q. R. Co., 263 U. S. 1, 68 L. Ed. 131, 44 S. Ct. 1;

Davis vs. Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33;
[fol. 211] Unadilla Valley R. Co. vs. Caldine, 278 U. S. 139, 73 L. Ed. 224, 41 S. Ct. 91;
Van Derveer vs. Delaware L. & W. R. Co., 84 Fed. (2d) 979, 981;
Paster vs. Pennsylvania R. Co., 43 F. (2d) 908, 910;
Hylton vs. Southern R. Co., 84 F. (2d) 393, 395.

The first three of these cases constitute and are representative of that theory that the individual who has full control of an operation and is in a position to and has the means at hand to govern and control the action to be taken, where failing to do an act required by specific rules and orders of the company, which failure constitutes the sole efficient cause of the injury, is guilty of negligence which prevents any recovery whatsoever.

The last three cases, representing decisions of the circuit courts of appeal, have extended that doctrine beyond the terms of the decisions of the Supreme Court (see Brock vs. Mobile and Ohio R. R. Co., 51 S. W. (2d) 100, 333 Mo. 918), to cover even those cases where there may have been contributing negligence on the part of others. However, in so doing, the latter cited cases are not in harmony with the decisions of this court or with the decisions of the Supreme Court of the United States.

The general rule of construction of the Employer's Liability Act, in respect to which the above cited six cases are exceptions, is represented by the following cases:

Wilson vs. Chicago B. & Q. Ry Co., 296 S. W. 1017, 317 Mo. 647;
Brock vs. Mobile & Ohio Ry. Co., 51 S. W. (2d) 100, 330 Mo. 918;
Good vs. Missouri, Kansas & Texas Ry. Co., 97 S. W. (2d) 612, 339 Mo. 330;
Rocco vs. Lehigh Valley Ry. Co., 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743;
Union Pacific R. R. Co. vs. Hadley, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

[fol. 212] These cases are representative of the rule that where it is necessary for an individual to act through or with others, and in connection therewith the employee in some way is negligent, resulting in an injury, yet if that in-

jury is due in whole or in part to the acts of others, whether they be officers, agents or employees, then such act of negligence on the part of the employee is but contributory to the damage or injury, and but reduces the amount which he would otherwise be entitled to receive, but does not constitute a bar to the action. We respectfully assert that the instant case is of the latter classification and is analagous to those cases last above cited.

In the instant case, it required action on the part of the engineer to avert any injury or damage to this plaintiff. No matter how diligent this plaintiff was or could have been, he did not have the means at hand or the authority to check or stop the movement of the train. Therefore, no matter what he did or could have done, he was absolutely dependent upon the action of the engineer to avert or diminish the damage and injury which occurred.

These facts effectively distinguish the instant case from those cases cited by defendant, and should convince this court of the inapplicability of those cases, and to demonstrate this fact we beg the court's indulgence in a brief discussion of those cases.

Frese vs. Chicago B. & Q. R. Co., 290 Mo. 501, 235 S. W. 97, 263 U. S. 1, 68 L. Ed. 131, 44 S. Ct. 1. This case was brought to obtain compensation for the death of the engineer of a train which had proceeded to cross a railroad grade crossing in charge of a Burlington freight train which was run into by a Wabash train coming from the left into the intersection. It was alleged that the fireman was negligent in failing to warn the engineer, that the engineer was wholly dependent upon the fireman to advise of the danger of the other train, and therefore was excused from compliance [fol. 213] with the Illinois statute which required the engineer to know that the crossing was clear before proceeding. This court (Mo. 514) stated:

"This action of the court in our opinion was reversible error, for the reason that respondent's own evidence showed that the engine in question was under the control of the engineer who was killed, and under the Statute of Illinois, before copied, imposed upon him the imperative duty to positively ascertain that the way was clear before entering upon the crossing. This he did not do, but had he done so, he clearly would not have been killed."

Thus this court, in referring to any supposed duty of the fireman to observe and warn the engineer, held that such

duty did not abrogate the specific provisions of the Illinois statute. The Supreme Court of the United States, in concurring in this conclusion, stated (L. Ed. 132):

"* * * The statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty * * *"

The peculiar statutory provisions in that case gave rise to the particular decision. Also, there was a specific order and rule requiring the performance of particular duties. The statute required that the train be brought to a stop within eight hundred feet of the crossing and was not to proceed unless the track was known to be clear. There was no general order or rule requiring exercise of judgment or discretion.

Davis vs. Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 33. In this case, recovery was sought for the death of an engineer operating a train which, contrary to specific orders, ran past the siding onto the main track and collided with a train coming the opposite direction. The orders given to the train crew specifically required that the train should [fol. 214] wait on the siding until the other train had passed. Notwithstanding that, a request was made that the other members of the crew watch for the train that was to pass, and the train operated by deceased proceeded on past the siding. It was the plaintiff's position that contributory negligence on the part of other members of the crew contributed to the damage or injury. However, Mr. Justice Holmes stated (L. Ed. p. 216):

"It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4 and managed its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act, as required, on the ground that it might possibly have been prevented if those in secondary relation to the movement had done more."

We direct the court's attention to the emphasis the court has placed upon the fact that the engineer had physical control of and determined the movement of the train. Further, that there were specific orders covering the par-

ticular movement which were violated and ignored by the individual who sought to recover damages.

Unadilla Valley R. Co. vs. Caldine, 278 U. S. 139, 73 L. Ed. 224, 41 S. Ct. 91. In this case, deceased was a conductor in charge of train No. 2 and had received printed orders that he was to pass train No. 15 on the siding at Bridgewater yard. The order was permanent unless countermanded in writing by the Superintendent. Instead of waiting for his orders at Bridgewater as he was required to do under the rules of the company, Caldine directed his train to proceed, with the resulting collision with train No. 15.

It was argued that there was contributory negligence on the part of the engineer in proceeding to carry out Caldine's [fol. 215] orders. The court, in holding Caldine's act was the sole efficient cause of the damage, stated (U. S. p. 141, L. Ed., p. 232):

"It is our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts. * * *"

And in respect to the failure of another employee to deliver to him a message from the other train to the effect that it was late, but was coming on in, the court stated:

"* * * A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."

In this case Caldine, by cool and deliberate action, violated and disregarded specific rules when he instructed the engineer to proceed down the track. No emergency situation of any kind existed. He had definite specific orders to do otherwise. He was in charge and in command of the train. He had the means at hand and the authority to do or to prevent the doing of the act which was the sole efficient cause of the damage. There is no similarity to the instant case.

Van Derveer vs. Delaware L. & W. R. Co., 84 Fed. (2d) 979, 981. A conductor, in violation of a specific rule not to change the switch set by another of the crew until the operation of that other crew was completed, proceeded to change two of the switches so as to facilitate the movement of his own train. He knew of the switching operations then being carried on by the other crew. The court held that he could not recover for his injuries, and stated at page 981:

[fol. 216] "When an injury to one employee results from the combined fault of himself and a fellow-worker, the damages are divided, but an exception has grown up when the injured employee's fault is the violation of a rule or an express instruction."

As we shall hereinafter point out, this decision, based upon the above statement, is a departure from the rule established in the Frese, Kennedy and Caldine cases, and is not in accordance with the views of this court as expressed in its decisions.

Paster vs. Pennsylvania R. Co., 43 F. (2d) 908, 910. Again, we are concerned with an action seeking recovery of damages by one in charge of the operation, and in this case the court recognized the fact that prior cases wherein the violation of a rule was found to defeat recovery, all involved individuals who were in command of the activities, and stated at page 910:

"These decisions concerned engineers, conductors or the like, but if this be material, Paster certainly falls within the class for he was in charge of the repair."

Likewise, the court recognized the other salient features of the Frese, Kennedy and Caldine cases, and stated at page 910:

"In these it was held that the disregard by a servant of specific orders or standing rules, promulgated for his own safety, will bar his recovery though the injury was due as well to the fault of other servants. Just how far this may go we do not know; possibly it will be confined to rules which provide for a specific contingency, but apparently it goes at least so far."

This is another case which has been criticised by this court in its decisions, as will hereinafter be pointed out.

Southern R. Co. vs. Hylton, 84 F. (2d) 393, 395. Here damages were sought for injuries to an engineer in sole and complete charge of the train movement and recovery was denied based upon the violation of a specific written order delivered to him immediately prior to the incident. [fol. 217] The court stated (page 845):

"In this situation we think it clear that Hylton's general disobedience of the 19 order and his specific and voluntary release of control because he had misjudged the distance of the danger constituted the sole efficient cause of the disaster, and the absence of any further second flag cannot be treated as a substantially contributing cause."

This case likewise presents no situation analagous to the instant case, and it will be noted that this latter case is not in harmony with the Paster and Hylton cases, but is based upon the "sole efficient cause" theory.

In our discussion of the foregoing cases we have endeavored to point out that the Supreme Court of the United States has held that the acts constitute a bar only in those cases wherein, (1) the individual seeking recovery, or in respect to which recovery was sought, was in actual command and had both the means at hand and the authority to determine the movement of the train, and (2) that the particular individual seeking recovery, or in respect to whom recovery was sought, violated a specific order or rule having unquestioned application and requiring very definite and specific action which could only be satisfied by doing a particular thing in a particular way.

The United States Circuit Court of Appeals, 2nd circuit, in the case of Miller vs. Central Ry. Co. of New Jersey, 58 Fed. (2d) 635, 637, in referring to the Frese, Kennedy and Caldine cases, said:

"All these decisions involved specific precautions for specific occasions; the stopping of a train at a given spot until another passed or until the track was clear. No doubt the doctrine is not confined to train movements; * * * but it does not seem to us to extend to rules generally enjoining caution or responsibility—in spite of some of our language to the contrary * * *. If it did, an employer could revive [fol. 218] the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law makes a con-

dition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; * * *."

This court's decision in the instant case makes exactly this exaction of care upon the plaintiff. By minute calculation and careful consideration, the court has considered the acts of the plaintiff and determined that under a very general rule a specific action must be taken, and has concluded that because of a failure to do that thing or to take that action in a particular way, plaintiff is totally and wholly barred from any recovery whatsoever.

Under the Miller case, supra, plaintiff is entitled to go — the jury on the basis that plaintiff could be guilty of nothing more than contributory negligence in failing to make the engineer understand the warning, signal, notice or what we may call it. Plaintiff did perform an act, and conceding for the sake of argument that same act on plaintiff's part was required, he can only be charged with failing to perform to perfection a duty required by a very general rule, in respect to which there is no person whosoever to judge its adequacy or sufficiency of any attempted compliance. Therefore, this opinion places upon plaintiff the same duty that might under the general law be placed upon him were the Federal Employer's Liability Act not on the books. The decision might be proper if the Federal Employer's Liability Act did not require that contributory negligence could reduce, not deny, damages. As stated by Judge Hand in the foregoing case, that certainly is not within the intention of the Congressional Act.

[fol. 219] It would be difficult to find an example of a rule more general in its terms and by its terms more remote insofar as plaintiff is concerned. The only rule in evidence is that which charges the engineer, not the fireman, with the duty of seeing that the fireman keep a lookout when the fireman's other duties permit him to do so. There is no specific requirement in the rules that the fireman notify the engineer of anything which he may see on the track or in the vicinity thereof. There is nothing in the record so far as rules or orders are concerned by which the notification or warning, or the validity thereof, can be judged or its sufficiency determined. For this reason, if for no other, the jury is entitled to pass upon the sufficiency of the warning or signal, rather than for the court to declare on a matter of law that it was incomplete or insufficient.

Insofar as other decisions of the Federal courts are not in accord with the foregoing, as exemplified by the Miller case, supra, this court, in its decisions, has specifically repudiated other views. We refer to the cases of Brock vs. Mobile & Ohio R. R. Co., 51 S. W. (2d) 100, 330 Mo. 918; Good vs. Missouri, Kansas & Texas Ry. Co., 97 S. W. (2d) 612; 339 Mo. 330; Wilson vs. Chicago B. & Q. Ry. Co., 296 S. W. 1017, 317 Mo. 647.

Wilson vs. Chicago B. & Q. Ry. Co., 296 S. W. 1017, 317 Mo. 647. The deceased fireman was killed in a head-on collision which resulted from the engineer's moving the train from a passing track onto the main line before the train coming in the opposite direction and having precedent over the first train had cleared. It was contended by the company that under the rules the fireman had a primary and personal duty, non-delegatable, to know the rules, to keep, to correct any oversight which might be made by the engineer. Defendant charged he was presumed to read and to [fol. 220] know the orders, and should have called the engineer's attention to his error in leaving the passing track too soon, further that had the fireman performed these duties required by the many rules offered in evidence, the company contended the accident would never have occurred. After a careful consideration of the Frese, Kennedy and other cases, this court said (S. W. 1024):

"But assuming for the purposes of defendant's argument, that deceased was negligent in the performance of his duties, nevertheless the evidence clearly demonstrates that the conductor and engineer, who were deceased's superiors in authority, in the operation and management of the train, were likewise both guilty of negligence, and that their negligence, in part, at least, was the cause of deceased's death."

And further at p. 1025:

"In the case at bar the deceased fireman Wilson did not have physical control of train No. 83, nor was he managing its course, for the proof tends to show that his superiors, the conductor and the engineer, were highest in authority of the train crew, under the rules of defendant which made the conductor and engineer 'equally responsible for the safety and proper handling of the train.' We are convinced that defendant's preemptory instructions were rightly refused by the trial court * * *."

Brock vs. Mobile & Ohio Ry. Co., 51 S. W. (2d) 100, 330 Mo. 918. The administratrix of a section foreman brought an action for death resulting from the company's train rounding a sharp curve adjacent to two trestles without any warning, and running into the motor car used by the section crew. It was contended that Rule 1273 required the plaintiff, when operating hand or push cars, where there was not a clear view of the track far enough ahead to insure absolute safety, to see that flagmen were sent out with stop signals to protect them.

[fol. 221] While it was thought that plaintiff's failure to comply with this rule may have constituted contributory negligence, yet this court stated that the jury had a right to determine whether or not the company's engineer was negligent in failing to sound a warning when passing through the cut and around the curve. This court stated (Mo. p. 938):

"We have held that there is substantial evidence in the record tending to show the existence of the custom pleaded and that the failure to sound the whistle in conformity therewith was negligence as to deceased. There is also ample evidence from which the jury could find that had the customary whistles been sounded they could have been heard by the section crew at a sufficient distance and in time, the conditions considered, to have removed the section car from the track and avoided the collision, and, considering the situation as a practical unit, that the collision resulted at least in part from the negligence of the trainmen in failing to observe the duty imposed upon them by the custom. At most Brock was guilty of contributory negligence and we cannot, upon the facts, say as a matter of law that his failure to comply with the rule was the sole cause and that the failure of the trainmen to sound the customary whistle was no part of the causation."

No one would contend for a moment but that the engineer had a specific duty to apply the brakes when warned of the distant danger. Failing to do so constituted negligence, which the jury was entitled to pass upon.

We also desire to point out that this court in this case has specifically stated that the Paster case, supra, (cited by defendant as authority) is not in accord with this court's views to the extent that that case indicates that a recovery will be denied when a servant disregards specific orders,

even though the injury was due as well to the fault of other servants. This court stated (Mo. p. 937):

[fol. 222] "While in some of these cases there is language which on its face seems to lend support to this view, such language must be considered an analyzed in the light of the facts of the case. *We are not inclined to adopt such an interpretation.* As we understand the decisions under consideration the court merely applied to the facts of the particular case the recognized rule that where the injured or deceased employee's *own negligence is the sole proximate cause* of his injury or death there can be no recovery * * *"

And referring again to the Wiles, Frese and Kennedy cases, it is stated (Mo. p. 938):

"Our understanding of those cases as there expressed was that recovery was denied because under the facts no causative negligence on the part of other employees of defendant was shown or that the injury was not shown to have resulted 'in whole or in part' from the negligence of any other employee."

We respectfully suggest to this court that just as this court in the Brock case, supra, found that all of the situation should be considered "as a practical unit," so in the instant case it is only fair and just that the situation be considered "as a practical unit." The fireman gave a warning, the engineer heard but did not act, appearing to view the warning as a joke, failing to inquire or respond in any way. If he did not understand, his duty was to inquire. The negligence of the engineer continued right up to and along with any negligence which could be attributed to the fireman, and was a continuing and existing one up until the moment of the impact.

Under these cases, the court's opinion improperly and unjustly singles out the situation of the fireman and places upon him the onus of the entire situation. Such is not consistent with these cases dealing with facts substantially similar to those in the instant case.

[fol. 223] See also Good vs. Missouri, Kansas & Texas Ry. Co., 97 S. W. (2d) 612, 617, 339 Mo. 330, 299 U. S. 605, 81 L. Ed. 446, 57 S. Ct. 231. All of these decisions we respectfully submit are entirely consistent with the rulings of the United States Supreme Court in analagous cases.

Rocco vs. Lehigh Valley Ry. Co., 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743. In this case the petitioner's husband, while riding a track inspection tricycle, was killed by a head-on collision with defendant's passenger train. Deceased's duties required him to travel over defendant's tracks on the motor car twice daily. The rules required that he inquire of the dispatcher respecting the location of defendant's trains before starting on any trip. Defendant, by making no inquiry of any kind, violated the rule on the day he was killed. That day was stormy, resulting in washouts in the track and delays. The accident occurred on a blind curve without any warning by the engineer of the approach of the train. The Supreme Court held that the issues were for the jury, that the violation of the rule did not forbid the recovery on behalf of plaintiff. It was within the province of the jury to consider the possibility of negligence on the part of defendant in failing to sound a warning before entering the curve and in failing to be on the lookout for workmen who might be repairing the track. (U. S. p. 280, L. Ed. p. 746):

"but it was open to the jury as above shown to show that the motorman of the train was also guilty of negligence which contributed to the collision. Rocco's infraction of the rule was a concurrent cause, but may not in any proper sense be held the primary cause of the accident. His negligence did not preclude a finding by the jury that his death was in part due to the negligence of the respondent's servants."

[fol. 224] It seems that this is clearly a similar case to the instant case, in that the engineer should have been on the alert for any warning which might have been given by plaintiff. If, as contended by defendant, he was unable to see and observe the condition of the track in front of him because of the curve, he should have been on edge, so to speak, to receive any warning which might have been given or might have been expected to be received from the plaintiff. He was also familiar with the fact that, being within the yard limits and in running a second-class train, he would have to guard against the extra ahead of him; that it was the practice (so the defendant claims) for trains to uncouple at that particular point where the collision occurred and leave the train on the main track while the engine went up to get water. All of these things should have required that

the engineer be alert to any suggestion of danger which might have been made by the fireman. Most certainly, the jury had a right to consider whether under all these circumstances there was not negligence on the part of the engineer in failing to hear or to understand any warning which might be given.

Union Pacific R. R. Co. vs. Hadley, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318. The deceased was a brakeman on a freight train which, while standing on the main line, was hit from the rear by another freight train. Defendant contended that if the deceased had complied with the rules and gone back to warn the following train by lights and torpedoes instead of remaining in the caboose, the accident would never have occurred. A preceding train had broken down and the train deceased was operating on was required by the dispatcher to return the broken-down engine to the station. In this case Mr. Justice Holmes stated (L. Ed. 755, U. S. 333):

[fol. 225] "But it is said that, in view of the defendant's conduct, the only approximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another, when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

In reviewing this case, it would be helpful to compare it with the case of Great Northern Railroad Company vs. Wiles, 240 U. S. 444, 60 L. Ed. 732, 36 S. C. 40, in which case it was held that the brakeman's failure to comply with a rule requiring the setting out of lights and torpedoes when the train was delayed on the track was the sole causation of the accident, and therefore no recovery could be had.

Again, it should be emphasized that we must look at the situation as a practical unit, irrespective of the logical priorities which may be apparent. All of this brings us to the

very evident conclusion that the meat of the court's opinion is that because plaintiff failed to repeat warnings once given until the engineer might give some evidence of comprehending them (however extended an operation this might be), he is forever barred from compensation for the injuries received. This is not a proper consideration of the facts in this case. A warning was given which the court has found was in "language which, if understood, would have advised [fol. 226] the engineer of the danger." It is absolutely impossible to conclude that a repetition of the warning once or more would have produced any different result from that which was obtained. It was a warning in proper terms given under circumstances which any reasonable person would have understood and acted upon. For some reason the engineer did not act. Whether additional warnings would have produced any different result is entirely speculative and brings about a situation comparable to that presented in the Rocco case, supra, wherein it was determined that even if the inquiry had been made, complying with the rule, there could be no valid assumption that the result would have been different. It should be remembered that the explanation given by the plaintiff was that the engineer "looked like he thought he was joking." This was a proper answer given by the plaintiff in response to a proper question and should be considered by this court in this case. It was a description by the witness of how the engineer looked after the warning was given. If the engineer chose to accept the warning as a joke he was privileged to do so, but his acts in so doing constituted negligence. The jury had the right to take this into consideration in this case, as the Supreme Court held that the jury could consider the facts in the Rocco and Hadley cases having a bearing upon the entire situation.

Likewise, the jury had a right to consider the negligence in the defendant's failing to be on the alert to accept the warning and to understand it and to act upon it. They had a right to consider his negligence in failing to be attengive, when under the circumstances he should have known of the possibility of danger ahead and should have been [fol. 227] cognizant of his dependence upon the warning that the fireman might give him of that danger. The jury had every right to consider the possibility of his being negligent in failing to hear and understand this warning to the same

extent that they might consider his act in another case had he pulled the wrong lever and accelerated the speed of the engine under such circumstances.

We respectfully suggest that plaintiff was no guarantor of the understanding of the engineer, but likewise assert that if the court is going to consider that as a responsibility of the plaintiff, the court must consider the possibility of a negligent failure on the part of the engineer to understand.

[fol. 228] IV

The opinion in this case requires any employee required under the company's rules to give a signal, warning or notice to guarantee the understanding of the person to whom the statement or signal is directed. This is contrary to all authority on the subject and conflicts with many decisions of this court, such as:

Peppers vs. St. Louis-San Francisco Ry. Co., 295 S. W. 757.

The opinion of the court goes so far as to make the plaintiff the insurer of the understanding of his superior, the engineer. This never has been the law in this state. Whether the hearer of a warning understands and comprehends its meaning is immaterial as a matter of law. The law measures the legal effect by the warning or notice itself. To demand proof of comprehension and understanding of a given fact would vary so much that it would be impossible to establish rules of conduct. The intelligence of the hearer, his physical and mental abilities or disabilities would have to be taken into consideration, the nature of the circumstances surrounding the case, would have to be considered. It has always been recognized in this state that it is the duty of the defendant to select, for the purpose of performing responsible duties, servants who are physically and mentally capable of skillfully performing the service, and mentally capable of comprehending all of the duties required of them in the course of the performance of their service, so our established law is that the warning or notice itself, and the manner given, is the test by which it is to be judged as sufficient or insufficient.

The court's opinion recognizes that the notice or warning was given by the plaintiff, and that the character of the warning was such that the engineer, had he understood the

warning, would have been apprised of the danger. The ques-
[fol. 229] tion as to whether the engineer understood the warning does not turn on the question as to whether the warning was vague and uncertain in its meaning. The question as to whether the warning was received by the engineer is not put in issue. The only issue raised in the opinion of the court is the deduction that because the engineer did not act on the warning, although he heard the warning and although the warning was sufficient, he did not understand the same; therefore plaintiff cannot recover. An engineer or other employee is required to understand and comprehend reasonable signals, warnings, notices, statements, etc., and failure to do so constitutes negligence.

This responsibility is referred to in the case of Peppers vs. St. Louis-San Francisco Railway Co., 295 S. W. 757, 316 Mo. 1104. In this case, the plaintiff, a minor was riding as a guest in an automobile going to an Armistice Day celebration at Legion Hall, a short distance from Eureka Station. At a certain point, a road leading to the Legion Hall turned from the public road, crossing the tracks. When the driver of the automobile in which plaintiff was riding reached the crossing, a freight train headed west was standing across the road. After a short interval, the freight train was pulled across the road, permitting the driver of plaintiff's car to pass. The freight train obscured the view of the track from the direction in which defendant's passenger train headed east was coming, and plaintiff was injured when his car was struck by the passenger train.

Defendant contended that the case should be taken from the jury on account of the absence of facts demonstrating a right of recovery, and that the sole negligence causing the
[fol. 230] collision was the negligence of the driver of the car in which plaintiff was riding and driving onto the track. There was testimony that no warning was given, either by whistle or bell, or otherwise.

In holding otherwise, this court stated (S. W. 759):

"The fireman testified that he saw a man on the back of the freight train giving a signal; that he did not do anything at that particular moment, because he did not know what the man was doing; that he understood his actions when he saw the front wheels of the machine come from behind the car. Moreover both the engineer and the fireman said that they saw the freight train. The engineer stated that he could not

tell whether it was standing or moving. The fireman stated that it was moving when they first passed the west end of the train. Both the engineer and the fireman knew that the freight train was near the crossing and that it obstructed the view of persons crossing the tracks from the public road going to Legion Hall. As it was Armistice Day, with people celebrating, they could expect travelers might cross the tracks behind the freight train. It was their duty to take the ordinary precautions that the circumstances required to protect lives, and the ordinary precautions in the instant case required the continuous ringing of the bell and at reasonable intervals, at least, the blowing of the whistle. This is emphasized by the fact that at a considerable distance from the crossing the fireman saw the brakeman on the freight train signaling, *which ought to have warned him of an unusual situation ahead, and that some peril was lurking.*''

So in the instant case the fireman gave the engineer a signal. We know he heard it, because he turned his head toward the plaintiff and acted as though ''he thought I was joking with him or something.'' Under such circumstances, the engineer had no business assuming that anything but a valid signal or warning was being given. He knew that the extra train No. 1229 was just a few minutes ahead of him on [fol. 231] the track. He knew that the usual practice was to stop the train at the Santa Fe crossing and uncouple the engine to get water. He should have been very much alert to any possible signal, warning him of lurking danger, all the more so because he was unable (according to defendant) to see down the track because of the curve. All of these should have been evident to him, and made the possibility of danger very real to him. They are facts far more evident and readily recognizable than those with which the court charged the train crew in the Pepper case, supra, to-wit, that the day being Armistice Day, there would be people celebrating, crossing over the tracks to reach the Legion Hall.

From this decision, and others, it is quite apparent that it is the duty of the engineer to be alert and to understand the warnings which may be given. They cannot guess or assume. This theory is supported by decisions in other states. In the case of Gillis vs. Atlantic Coast Line R. Co., 179 S. E. 62, the Supreme Court of South Carolina had be-

fore it a case wherein the fireman had signalled the engineer to stop the train. The court stated (S. E. 64):

"If he did, under the rules of the company itself, as well as the rule of common prudence, it would have been the duty of the engineer to have immediately stopped the train. This the engineer failed to do, and although he states in his testimony that no such signal was given, this raised an issue of fact for the jury, and the jury is the sole judge of issues of fact under our system of jurisprudence.

"If the engineer failed to obey the signal and thereby disobeyed the rules of the company, as well as the rule of common prudence, this would be negligence on his part, and such negligence would be chargeable to the railroad company."

See also McGillivray vs. Great Northern R. R. Co., 176 N. W. 200.

[fol. 232] We respectfully suggest that there is no justification for a decision of this court which fails to hold that under all the facts and circumstances the engineer should have anticipated the receipt of a signal or warning or statement from the fireman as to the condition of the track around the curve, and that had any signal, warning or statement been made by the fireman to the engineer which, by its terms, was sufficient to apprise the engineer of the situation and was given in a manner which could be heard, then the responsibility of the plaintiff ended, and there was no further responsibility on the part of the fireman to guarantee to insure that the engineer understood or comprehended the notice, statement, signal or warning given.

[fol. 233] V

The opinion and decision of the court is based upon an unreasonable and unduly technical construction of the term "to notify," and does not construe that term in its usual and ordinary sense in view of the relation of the term to the rest of the instruction, and in so doing is contrary to decisions of this court, such as:

State ex rel. Ambrose vs. Trimble, 304 Mo. 533, 263 S. W. 840, Cert. den. 267 U. S. 598, 69 L. Ed. 806, 45 S. Ct. 354.

The opinion herein is based upon what we believe to be an unreasonable interpretation of the plaintiff's burden

in this case, and of the terms used in the instructions. As a matter of law, all that was required of plaintiff was to have advised, told, stated, shouted, yelled, or otherwise indicated, to the engineer that the caboose was on the track a short distance ahead. No special form is required, in fact, such a message is often given by the hands and arms in what is recognized by all railroaders as the "stop" signal. Any such action on plaintiff's part is entirely sufficient, and discharges plaintiff's full obligation. Certainly, he should use words or motions which are fairly accurate and appropriate for the purpose, but the court has held that such terms were used. The court has given to the term "notified" a special, limited and technical meaning not required or permissible under the law.

If this decision stands as the law of this state, it cannot but embarrass the court in the solution of future problems. This decision would constitute perfect authority for the [fol. 234] defense of an action brought under the following circumstances:

A message is delivered to an engineer by the conductor to stop the train because the bridge is out a mile down the track. Immediately thereafter, the conductor, through no fault of his own, is temporarily incapacitated. The train proceeds down the track without any indication of slowing-up or stopping until rounding the curve the engineer sees the bridge washed out, but is at that time unable to prevent an accident. In between the delivery of the message and the point where the engineer can first observe the washed-out bridge, there is evidence that the engineer gave no indication of a comprehension of the message. Under the particular facts, a statement that there was not a scintilla of evidence in the record that the engineer "understood" the message, was accurate. Under what theory of justice could this court deny compensation for the death of the conductor or injury to any other employee?

If this theory of law is correct, why has not it been heretofore applied to case after case wherein a signal was given calling for a certain movement of a switch train, but that signal was not observed and followed, but was, shall be say, misunderstood. Is not negligence in failing to understand as great, if not greater, than negligence in misunderstanding a signal or direction, yet time and time again this court has allowed recovery where there has been a misunderstanding of the message, signal or warning, even

though in such cases there may have been some plausible excuse offered for the misunderstanding. By the statement in the court's opinion that there is not a "scintilla of evidence" that the engineer understood, is placed upon [fol. 235] every claimant a burden of showing and establishing "an understanding" of any message, signal or direction given. This is not and cannot be the law of this state.

Plaintiff respectfully suggests that there was no technical construction of the word or term "to notify" or "was notified" justified in this case, as stated by Judge White in the case of State ex rel. Ambrose vs. Trimble, 304 Mo. 533, 263 S. W. 840 (S. W. 843):

"If microscopic inaccuracies like that complained of should work a reversal in every case, no case could be affirmed."

This term "notify" or "notified" was used in the instruction in a very general sense in the petition, and should be so construed by this court. This is evident from the various terms applied to the act in the instructions submitted and requested in the case. The act is described in plaintiff's Instruction No. 2 (R. 168) as "was notified" and "signal." In defendant's instructions it was referred to as follows:

Instruction "C" (R. 174) said "warning;" Instruction "D" (R. 175) said "to warn" and "to have warned or notified;" Instruction "F" (R. 176) said "to notify" and (R. 177) "to have warned or notified."

"Notify" is, of course, but the verb to the noun "notice" and does not necessarily carry with it an insurance of an understanding. In fact, the use of this word in that sense is obsolete. In this connection, Funk's dictionary defines this to be, "intelligence by whatever means communicated; • • • an order communicated to one; • • • obsolete: (a) knowledge; (b) an idea; a notion."

[fol. 236] And in Webster, "notice" will be found to mean:
"Act of remarking or observing;"

Also will be found:
"Obs. a. Knowledge."

And in respect to the verb "notify", we find,
"To give notice of; to declare;"

We also find that the words "remark" and "advice" are synonyms.

We, of course, recognize that in normal situations involving a legal obligation, "notice" and "to notify" under no circumstances guarantee an understanding by the person receiving the notice or notified. They must act upon their own responsibility and interpret the notice or notification at their own risk. All that can be required of the person giving the notice is that it be couched in terms appropriate for the purpose, and the court has stated in its opinion that such terms were used in the instant case. It would appear that the decision of the Supreme Court of Alabama in the case of Southern Ry. Co. vs. Bunt, 32 So. 507, 131 Ala. 519, is very appropriate. In this case, the court had for consideration the correctness of an instruction averring "the engineer of said engine wantonly or intentionally caused or allowed said engine to propel said car against said other car with too great force with knowledge or notice that plaintiff was between said cars, and in great danger from said car being propelled against said other car with such force."

The court, in considering this, stated (So. 508, Ala. 594):

"Wantonness in the doing of or the omission to do an act, the probable result of which will be to injure, can only be predicated upon actual knowledge of existing conditions attending the act or omission which caused the injury. Notice in such cases is not the equivalent of actual knowledge."

Also, in the case of Osborne vs. Alabama Steel & Wire Co., 135 Ala. 571, 577, this distinction is again brought out in connection with notice of defects:

[fol. 237] "The averment of the plea being knowledge or notice to the intestate being in the alternative, is no stronger than would be an averment of notice alone, and notice is not the equivalent of knowledge. Notice may consist merely of information as to collateral facts sufficient to incite inquiry and which an ordinarily prudent person would follow to a knowledge of the main fact."

Plaintiff therefore respectfully suggests that the decision in this case is out of harmony with the law as established by this court in that a technical and limited interpretation has been made to this term as used in the pleadings and in

the instructions, and which is not justified in the law and which will but constitute an obstacle in the pathway of the administration of justice.

[fol. 238] VI

If no satisfactory relief can be granted pursuant to the preceding propositions, the opinion should be modified to the extent of remanding the cause for further procedure, and in failing so to provide, the opinion conflicts with the opinion of this court in such cases as Finnegan vs. Mo. Pac. R. Co., 149 S. W. 612; 244 Mo. 608.

Under any circumstances, the opinion of the court in this case should be modified to the extent of ordering a remanding of the case. It is the established law of this state that unless the court is absolutely convinced without doubt that plaintiff cannot produce facts justifying the recovery, the cause should be remanded. Hamilton vs. Frisco, 279 S. W. 177, 181; (Mo. App.)

Even though it is not suggested in the briefs or otherwise, that evidence found to be lacking could be produced, nevertheless the cause may be remanded. Cole vs. Kansas City So. Ry. Co., 268 S. W. 886, 887; (Mo. App.)

Plaintiff has contended that the court erred in refusing plaintiff's Instruction No. 7, based upon the negligence of the engineer in operating the train at an excessive speed and in failing to have it under control prior to and at the time of the accident. Plaintiff recognizes that there is not an abundance of evidence on this point in the record, but believes there was sufficient to take the case to the jury on that point. If, however, the court determines that a sufficient record is not made on this point, plaintiff should be permitted "to produce evidence to overcome the hiatus * * * found in the proof as shown by the record. * * *" Hamilton case, supra.

Plaintiff has also contended elsewhere in this motion that the court's conclusion in this case is based wholly on a calculation of the time passing between the first sight of [fol. 239] the caboose and the time plaintiff jumped. This is bottomed upon a speed at time of sighting the caboose and thereafter of six miles per hour. This conclusion is reached from statements that six miles per hour was the speed of the train back at the Walnut River Bridge. The track was a one per cent down grade from there to the point

of collision, justifying an inference of a greater speed than six miles per hour by the time the train reached the road crossing.

We suggest to the court that before plaintiff is denied all right to recovery, that the case be remanded so that more specific evidence may be adduced on this point. It does not seem just that so final, and shall we say fatal, conclusion be based on an assumption which is contrary to valid testimony and the reasonable inferences to be drawn therefrom, and which assumption can be nothing but an assumption, because there is no definite testimony either by plaintiff or defendant that the speed of the train was six miles per hour, sixty miles per hour, or any other speed at the time the plaintiff stated he first saw the caboose or thereafter.

It was disclosed for the first time in the trial of this case that the engineer could have observed and seen the standing train long before the plaintiff herein had any opportunity to see it (R. 139, 140). This testimony was given by defendant's witness and was a surprise to plaintiff. Plaintiff should be given an opportunity to investigate all of the facts in connection with this possibility and to present such evidence as may be obtained at a re-trial under an amended petition alleging the negligence of the engineer in failing to see and observe the train on the track at that point.

[fol. 240] In this connection, we direct the court's attention to the fact that the situation of the engineer may, under proof, be found to be substantially different from the situation of the fireman under what defendant would contend to be similar situations. We refer to the effort on the part of the defendant to prove that the fireman could have observed the train upon the track by looking across the field between the light plant and the trees (R. 154, 155) the difference being that (1) The evidence in respect to the ability of the fireman to see the train by looking across the field was disputed, and (2) At the points where the defendant charged that the fireman could have looked across the field and seen the train, the fireman's first duty was to look ahead down the track toward the crossing so as to avoid the possibility of injury to the individuals using that crossing.

We respectfully suggest to the court that there is a strong possibility that evidence may be produced on these points to sustain plaintiff's cause of action, and with these circumstances the least that can be done is to grant plain-

tiff a remanding of the case. See Chandler vs. Chicago and Alton R. R. Co., 158 S. W. 35, 251 Mo. 592, 603; Finnegan vs. Mo. Pacific R. Co., 149 S. W. 612; 244 Mo. 608; Riggs vs. Kansas City Railways Co., 220 S. W. 697, (Mo. App.).

[fol. 241] Conclusion

Respondent herein has, in the foregoing Suggestions, set forth ample authority for the request for a re-hearing, which is made to this court on behalf of respondent. These Suggestions are voluminous and should not be extended by unnecessary statements.

We respectfully pray that careful consideration be given by the court to the Suggestions which have been made and that the court in its wisdom will see fit to grant to the respondent herein a re-hearing.

Respectfully submitted, Harry G. Waltner, Jr. Sizer and Myers, Attorneys for Respondent.

[fol. 242] And thereafter and on the 28th day of June, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. Jenkins, Resp.

vs.

J. M. Kurn, et al., Apps.

Now at this day the Court having seen and fully considered respondent's motion and supplemental motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

And thereafter and on the 8th day of July, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. Jenkins, Resp.

vs.

J. M. Kurn, et al., Apps.

Comes now the respondent, by attorney, and files herein a motion to modify the opinion.

Which said motion to modify the opinion is in words and figures following, to-wit:

[fol. 243] IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, MAY TERM, 1940

No. 36,340

H. J. JENKINS, Respondent,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees, Appellants

Respondent's Motion to Modify Opinion

Comes now the respondent herein and within ten days of the issuance of the order of this court over-ruling respondent's motion for rehearing herein, and files herewith his application for an order modifying the opinion herein and in support thereof sets forth the following grounds and reasons:

1. The opinion herein reverses outright the $12,000 judgment obtained by respondent. The opinion herein rendered is based entirely upon one point, the failure of the respondent, appellant's fireman, to make the appellant's engineer "understand" the warning, signal or notice the respondent gave to the appellant's fireman of the danger ahead. This conclusion is reached entirely upon an assumption that the engineer did not "understand" the warning because he did not do anything to stop the train. The evidence in the [fol. 244] present record on this point is that ordinary conversation could be easily heard in the engine cab, that appellant's engineer had normal hearing, that respondent shouted in a loud voice the warning, that appellant's engineer turned his head towards him and looked as though he thought that respondent was joking. This evidence of understanding but disbelieving was not further developed in the trial of the case which is here under review. Respondent respectfully asserts, as a matter of fact, that said engineer did definitely and specifically "understand" the warning which was given but indicating disbelief and lack of credence, failed to apply the brake. Respondent respectfully

asserts that if this case is remanded, he believes that substantial evidence can be introduced to establish this fact. Such being the case, there should be an appropriate modification of the opinion herein remanding this cause for retrial.

2. The opinion and decision in this case is predicated upon the proposition that the appellant's engineer failed to "understand" the warning given by the respondent herein. This conclusion of a failure to "understand" is predicated entirely upon testimony in the record to the effect that for a period of "35 seconds" the defendant's engineer "although in the very jaws of death did nothing except to turn around and look at plaintiff." The conclusion that 35 seconds elapsed is based solely on testimony as to the speed of the train at the Walnut River Bridge, some 2,000 feet up-grade from the point of collision. The record in this case fails to disclose an iota of testimony [fol. 245] as to the speed of the train at the time plaintiff testified he could first observe the train ahead. From the record the Court concludes that the speed of the train was but six miles per hour at the time respondent first saw the train ahead and warned of the danger. This assumption is erroneous in that the speed of the train at that time was approximately twenty miles per hour rather than six miles per hour and accordingly, respondent is entitled to present to the jury on a re-trial the issue of the negligence of the appellant based upon the appellant's engineer's failure to keep the train under control, thereby violating the rules of the company and unquestionably placing the appellant in a position in which they should respond in damages for plaintiff's injuries. Such being the case there should be an appropriate modification of the opinion herein, remanding this cause for re-trial.

3. It was developed for the first time in the trial of this case that appellant's engineer should have observed the obstacle on the track long before respondent had any opportunity to do so. Such fact was unknown to respondent at the time of the trial and negligence on behalf of appellant was not alleged on the basis of this fact. If such be the fact, and respondent respectfully asserts that such is the fact and that substantial evidence to that effect can be introduced upon a re-trial of this cause, upon the introduction of substantial competent evidence to this effect, there are no authorities that sustain the view that plaintiff's subse-

[fol. 246] quent failure to give an adequate warning could but constitute contributory negligence on his part. All authorities are to the effect that the initial or primary duty rests upon the engineer to observe obstacles ahead and to control the train in such a fashion that it can be stopped before such obstacles are contacted. Respondent herein is entitled to an opportunity to allege such fact as grounds of negligence and to introduce testimony at a new trial in support of such allegations. This right is wrongfully denied the respondent under the present opinion, therefore the opinion should be modified so as to remand the case for new trial.

Respondent herein respectfully submits for the consideration of the court the affidavit duly attached to this motion and respectfully requests this court not to consider such affidavits as being the full extent of the evidence which may be introduced on a re-trial of this case, but as substantial proof that substantial evidence is available on the above points so as to warrant this court in remanding the case for re trial.

Wherefore respondent respectfully prays an order of this court modifying the opinion heretofore written in this cause and directing a remanding of the case for a new trial.

Respectfully submitted, H. G. Waltner, Jr., Sizer and Myres, Attorneys for Respondent.

[fol. 247] IN THE SUPREME COURT OF MISSOURI, SEPTEMBER TERM, 1939, JANUARY CALL

No. 36340

H. J. JENKINS, Respondent,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees of St. Louis-San Francisco Railway Company, a Corporation, Appellants

Affidavit of H. J. Jenkins

STATE OF OKLAHOMA,
County of Garfield, ss:

H. J. Jenkins being first duly sworn disposes and says:

That I am the Respondent in the above entitled cause now pending before the above named court. That there are

additional facts which should be brought before this court relative to the speed of the train immediately before the collision and whether the engineer knew and understood the signals which I gave him prior to the collision.

This train was carrying approximately 32 box cars loaded with wheat and 2 coaches attached to the rear of the train. About the time that this train approached the south edge of the Walnut River Bridge, the engineer pinched down the train to about 6 miles per hour. When this was done the engineer released the air-brakes and the train began to drift on down to the yard limit board and into the yard limits. The train naturally increased its speed because the cars were loaded with wheat and there is a sharp grade down toward the Sante Fe crossing. The speed increased gradualy and in my best judgment, the train was going, at the time it passed over the public crossing just south of the place of the collision, at approximately 20 miles per hour. At my trial in Greenfield, Missouri, I was not asked by my attorneys or by the attorneys representing the railroad; the speed of the train at the time I discovered extra train 1229 around the curve. I have given, on three previous occasions written statements in which I estimated the speed of this train at 20 miles per hour at the time I saw this caboose of train 1229. I first gave a statement to my superintendent, employed by the Frisco Trustees, in which I stated that the speed of the train was approximately 20 miles per hour. I next gave a written statement to the Claim Agent in St. Louis in which I state that the speed of the train at the time I discovered the cars around the curve, was approximately 20 miles per hour. [fol. 248] At the time I gave my written statement to the Frisco Superintendent, a representative of the Inter-State Commerce Commission was present, making an investigation of the accident.

The next written statement I made concerning the speed of the train was at the trial of the case of the widow of the engineer Reese against the Frisco Trustees here in Enid, Oklahoma. I stated under oath, at this trial that in my opinion, the speed of the train at the time I discovered the cars was going 20 miles an hour or more.

I further state that the railroad employees who were on my train No. 630; have all estimated the speed of the train immediately before the collision at approximately 20 miles or more per hour. This was done in the investigation be-

fore the Inter-State Commerce Commission's representative and in the trial of Mrs. Reese's case for the wrongful death of the engineer against the Frisco Trustees here in Enid.

I further state the distance from where the engineer released the brake valve and the train began to drift down into the yard limits and toward the point of collision, was approximately 2,000 feet or more. The brake valve was released approximately three pole lengths south of the yard limit board. The yard limit board is approximately 9 pole lengths from the point of collision. This train drifting down hill had a distance of approximately 1500 feet in which to increase its speed until I could see the back end of the caboose around the curve of extra train 1229.

I further state that I was approximately on the public road crossing south of the point of collision when I could first see the back end of the caboose of train 1229. The instant that I saw the caboose I yelled in a loud voice, "put that brake valve over in emergency; the whole dam train is down there in front of us". The engineer, at that time was sitting on his box looking straight ahead and when I yelled this warning, he turned his head toward me and looked at me, and I observed the expression on his face that he thought that I was joking, but I know that he understood the signal which I gave him because he was only a distance of 5 or 6 feet from me on his seat box and my seat box was directly across the cab from him. I know the engineer did understand my warning because I knew him for 23 years and his hearing was good and we could carry on a normal conversation together and hear each other as we were seated there before I gave the warning. I gave the warning many times louder than we talked to each other.

At the time I gave this signal I was sitting on my seat box and as quick as I could get up off of my seat box I started for the gangplank on the engineer's side. I was scared and excited because I knew there was danger ahead [fol. 249] and I intended to jump providing the engineer did not stop the train before the caboose was hit. Felton, the brakeman has testified and has told me that I was giving violent stop signals as I was going toward the gang plank and down the steps. Whether I was or not, I don't remember, but when I started down the gang plank I could not see the engineer or what he was doing because I was between the boiler and the front part of the engine which hid the

engineer from my view. I kept waiting while I was riding in this position to see if the engineer would stop the train because I knew that he had received my signal. When I saw that he was not going to stop the train before the collision, I jumped from the steps of the engine on the engineer's side where I received my injuries. The distance from the top of the gangway to the bottom step where I jumped was between three and four feet. From the time that I first discovered the caboose and gave the engineer a warning in a loud voice, I was excited and scared and I was doing everything I could to get down the gangway on the steps where I could jump providing the engineer did not bring the train to a stop.

At the time the engineer came across the Walnut River Bridge he had the first view of train 1229 by looking straight ahead. At this time I could not see this train from my side. After I got past the light plant I had the same view the engineer had on the bridge, but I would have had to look across the field to see. Also at the time I had this view we were approaching a public crossing which it was my duty to protect.

Further the Affiant saith nothing.

(Signed) H. J. Jenkins.

Subscribed and sworn before me this 5th day of July, 1940. (Signed) Esther Priebe, Notary Public. My commission expires January 10th, 1944. (Seal.)

[fol. 250] And thereafter and on the 4th day of September, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. Jenkins, Resp.,

vs.

James M. Kurn et al., Apps.

Now at this day, the Court having seen and fully considered respondent's motion to modify the opinion, doth order that said motion be, and the same is hereby overruled.

And thereafter and on the 14th day of September, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. JENKINS, Resp.,

vs.

JAMES M. KURN et al., Apps.

Comes now the respondent, by attorney, and files herein a motion to transfer to Court en Banc.

Which said motion to transfer to Court en Banc is in words and figures following, to-wit:

[fol. 251] IN THE SUPREME COURT OF MISSOURI, DIVISION No. 1, MAY TERM, 1940

No. 36340

H. J. JENKINS, Respondent,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees, Appellants

RESPONDENT'S MOTION TO TRANSFER CAUSE TO COURT EN BANC

Comes now the respondent herein and within ten days of the filing of the order of this court over-ruling respondent's motion for rehearing herein and files this motion to transfer this cause to the court en banc for the following grounds and reasons:

1. The opinion of the court in this case is in conflict with decisions of Division Number Two and of this court en banc, in that both parties to this cause joined issues both in the introduction of evidence and in the instructions to the jury upon the theory that a case was made for plaintiff, if plaintiff made a showing and was able to convince the jury that defendant's engineer was negligent and failed to hear or understand the warning given by plaintiff. Yet [fol. 252] the court in its opinion entirely ignores that theory and holds that plaintiff could only make a case upon a proof of an actual understanding of the warning by de-

fendant's engineer. Thus the opinion is in conflict with such cases as the following:

Taylor vs. Cleveland C. C. and St. Louis Railway Company, 62 S. W. (2) 69, 333 Mo. 650;
Cole vs. St. Louis-San Francisco Railroad Company, 61 S. W. (2) 344;
Blakenship vs. St. Louis Public Service Company, 71 S. W. (2) 723;
Fowlkes vs. Fleming, 17 S. W. (2) 511, 322 Mo. 718.

2. The opinion and decision of this court is in conflict with decisions of Division No. Two of this court and the court en banc, in that it is the established law that a plaintiff guilty of contributory negligence cannot be denied recovery but at most shall have his damages reduced in proportion to his own negligence. And under the facts in the instant case plaintiff was only guilty of contributory negligence and therefore the opinion and decision is in conflict with such cases as follows:

Crecelius vs. Milwaukee Railway Company, 205 S. W. 181, 274 Mo. 671; Retrial, 223 S. W. 413, 284 Mo. 26;
Laughlin vs. Missouri Pacific Railroad Company, 248 S. W. 949, 296 Mo. 345.

3. The opinion and decision of this court is in conflict with Chapter 685, Sec. 1, 53 Stat. 1404, amending the prior law on the assumption of risk under the Federal Employers Liability Act as of August 11, 1939, and now identified as 45 U. S. C. A. 54, in that a plaintiff cannot be denied recovery for injuries on the basis of his having assumed the risk [fol. 253] of his employment in any case where the injury resulted in whole or in part from the negligence of the officers, agents or employees of the defendant.

4. The opinion of this court is in direct conflict with the decision of the United States Supreme Court in the case of Frese vs. Burlington & Quincy Railroad Company, 263 U. S. 1, 68 L. Ed. 131, 44 S. Ct. 1. Under the rules of the company introduced in evidence it was imperative and the absolute duty of the engineer to have the train under control. Therefore, any failure on the engineer's part constituted negligence. The opinion and decision of this court can only find legal justification on the basis that (1) the action or failure

to act on the plaintiff's part constituted contributory negligence, or (2) the plaintiff assumed the risk of being unable to make the engineer understand or comprehend the warning. In either of the two above contingencies the opinion is in conflict with appropriate state and federal statutes and decisions as hereinbefore set out.

If the opinion be construed to determine that there was no negligence of any kind on the part of the defendants because there was a primary obligation or duty upon plaintiff to make defendant's engineer "understand or comprehend" the warning given, such opinion is in conflict with the Federal Employers Liability Act and particularly those sections which may be identified as 45 U. S. C. A. 51; 45 U. S. C. A. 53; 45 U. S. C. A. 54 and 45 U. S. C. A. 55. The opinion in holding as a matter of law that defendant's engineer could not be guilty of negligence in failing to understand or comprehend the warning given by deceased fireman denies to the plaintiff a right guaranteed plaintiff under the Federal Employers Liability Act and is therefore in conflict with that act and appropriate decisions of the Supreme Court of the United States so construing such act.

[fol. 254] 5. The opinion and decision of the Court in this case is in conflict with the Federal Employers Liability Act identified as 45 U. S. C. A. 51, 53, 54 and 55, in that defendant's engineer was the only one who had the authority and means at hand to control the course of the train and to avoid the injury complained of. Such being the case no act of plaintiff could had constituted more than contributory negligence in respect to any injury which might have resulted from the operation of the train. This is all the more true because of appropriate rules of defendant placing responsibility upon defendant's engineer to know that the way ahead was clear before proceeding.

Wherefore, in view of the foregoing reasons, respondent respectfully prays this court that its opinion to transfer this cause to the court en banc be granted.

Respectfully submitted, H. G. Waltner, Jr., Sizer and Myres, Attorneys for Respondent.

[fol. 255] And thereafter and on the 23rd day of October, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

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No. 36340

H. J. JENKINS, Resp.

vs.

JAMES M. KURN et al., Apps.

Comes now the respondent, by attorney, and files herein suggestions in support of his motion to transfer to Court en Banc.

Which said suggestions in support of the motion to transfer to Court en Banc are in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, SEPTEMBER TERM, 1940

No. 36340

H. J. JENKINS, Respondent

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees, Appellants

RESPONDENT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER TO THE COURT EN BANC

Comes now the respondent herein and advises the Court that subsequent to the filing of respondent's motion to transfer this cause to the Court en Banc, the Supreme Court of Oklahoma, in the case of Kurn et al., Trustees, v. Reese Administratrix, No. 29456, handed down a decision involving the same facts as are reviewed in the present case. In the case now pending before this Court, on the above motion, compensation is sought for the fireman of the train involved [fol. 256] in the wreck. In the Reese case, supra, the administratrix of the estate of Howard Reese, the engineer on that train, sought and obtained compensation for the death of the engineer. The case was tried under the Employers' Liability Act and after review of authorities, the Court points out that where the Court feels that concurring acts of negligence on the part of other employees makes the situations worse and put the plaintiff in a position where he is less likely to extricate himself from the position where his own negligence placed him, recovery is permitted. We believe

that that is exactly the situation applicable to the fireman's case, as well as to the engineer's case, and which fact has apparently been overlooked by the Court in the preparation of the opinion and which, therefore, places the opinion in conflict with the decision cited in respondent's motion to transfer. We, also, would like to point out this particular statement by the Supreme Court of Oklahoma in the course of the opinion:

"The evidence is conclusive that deceased knew that train 1229 was in front of him, and his running orders gave him all the information needed, and all that he did not know was its exact location on the tracks in front of him. His duty to keep a lookout for it and to take its position into account in operating his train was absolute."

In a situation of this kind, where there is an absolute duty upon the engineer to take into account the situation of a train in front of him, it is a miscarriage of justice to declare that as a matter of law he cannot be guilty of negligence in failing to hear, understand, recognize or comprehend instructions given him and which he must receive if he is to carry out his absolute duty to take the position of that train into account in operating his own train. This duty and responsibility on the part of the engineer is even more purposefully brought out in the following quotation, also from that opinion. After commenting upon the disagreement as to the speed of the train, and recalling that all agreed that Reese could have stopped his train had he seen the forward [fol. 257] train or had he been warned of it earlier, the Court stated:

"This aspect of the case does not account, however, for his failure to take into consideration the likelihood of the train being in front of him as it was."

Under the situation here involved there was an extraordinary duty on the part of the engineer to take into consideration this likelihood of the train being in front of him and to be absolutely intent upon receiving from the fireman instruction and advice as to the location of the train ahead. His failure to do this was a concurring act of negligence, making the situation worse and putting the fireman in a position where he was less likely to extricate himself from the perilous position confronting him.

It is clearly the judgment and determination of the Supreme Court of Oklahoma that in the situation involved in this case that both the engineer and the fireman had a concurring duty and obligation under the circumstances, such being the case, the application of the Employers' Liability Act requires that the respondent in this case be allowed to recover.

So that the Court may have available the opinion in the case, we are attaching to this memorandum a verbatim copy of the opinion as taken from "The Journal" published by the Oklahoma Bar Association of Oklahoma City and being the official advance sheets of opinions of the Supreme Court of that state. This opinion is found in No. 26, Vol. XI, dated September 28, 1940.

Respectfully submitted, H. G. Waltner, Jr., Sizer and Myres, Attorneys for Respondent.

[fol. 258] No. 29456. Sept. 24, 1940

KURN et al., Trustees,

v.

REESE, Adm'x.

Date Mandate Issue ——

SYLLABUS

Master and Servant—Action under Federal Employers' Liability Act for wrongful death of engineer—Verdict for plaintiff sustained on theory that collision was result of concurring acts of negligence of fireman and engineer

Notwithstanding the fact that an engineer is primarily charged with the duty to operate the engine pulling a train in a safe manner; and also notwithstanding the fact that standing orders and operating rules require a more cautious rate of speed at some times and places than others, yet where the lines of railroad track are curved so that for considerable distances the engineer has a view of only restricted distances ahead and by custom is dependent upon the fireman to keep a lookout, and where the evidence respecting whether the fireman did keep a lookout and inform the engineer of the presence of another train standing

ahead, as the engineer had a right to rely upon him to do, is conflicting, the verdict in favor of the personal representative of the engineer to the effect that the accident was the result of the concurring acts of negligence of the fireman and engineer will be affirmed, the engineer's negligence being held, in effect, to be contributory only and not the proximate cause of the accident. 45 U. S. C. A. 53.

Appeal from District Court, Garfield County; J. W. Bird, Judge.

Action to recover damages for wrongful death under Federal Employers' Liability Act by Pearl C. Reese, administratrix of estate of Howard Reese, against J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Jamison, of St. Louis, Mo., and Cruce, Satterfield & Grigsby, of Oklahoma City, for plaintiffs in error.

Ratner, McAlister & Mattox, of Parsons, Kan., and Simons, McKnight, Simons, Mitchell & McKnight, of Enid, for defendant in error.

BAYLESS, C. J.:

Mrs. Pearl Reese, administratrix of the estate of Howard Reese, deceased, brought an action in the district court of Garfield county to recover money damages for the death of [fol. 259] deceased, an engineer, caused by the negligence of J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, his employer, and the defendants appeal from a verdict of the jury in favor of plaintiff.

This action is admittedly governed by the Employers Liability Act, 45 U. S. C. A. 51, et seq., and the decisions of the federal courts are decisive when applicable.

There is but one proposition presented by defendants, and it involves the alleged error of the trial judge in overruling defendants' demurrer to the plaintiff's evidence. The arguments of the parties are directed to this point: admitting that the deceased was guilty of negligence, the negligence of the fireman in not giving him warning was or was not the primary cause of the accident. The plaintiff based her cause of action on the negligence of the crew of the forward train to observe rule 99, and on the negligence of the fireman in failing to keep a lookout on his side of the engine and track; and the defendants based the defense upon the alleged primary negligence of the engineer in fail-

ing to observe a special rule with respect to keeping the train under control. We do not mean to say the plaintiff admits negligence on the part of the deceased, but rather she says that the question of fact of the fireman's negligence and its effect upon the incident is such that it must be submitted to the jury and that the deceased's negligence, if any, is not an absolute defense but a matter to be considered in mitigation of the damages.

Deceased and his fireman were the engine crew on train No. 630, which was traveling generally north, and following about 20 minutes behind train No. 1229. The tracks coming from the south into Winfield, Kan., crossed Walnut river almost due north, and about 400 feet north of the bridge begins a 5° 21′ curve to the east, 760 feet in length, after [fol. 260] which the track ran in a straight line, in a northeasterly direction for 1,140 feet, after which begins a curve 6° 11′ to the northwest, about 900 feet in length, after which the track runs in a straight line for about 200 feet in a northwesterly direction and crosses the tracks of the Atchison, Topeka & Santa Fe Railway Company. Thus between Walnut river and the Santa Fe tracks, on the north, some 3,200 or 3,300 feet away, there is what may be called an S curve. As we understand the record, there is a slight down grade from the river northward. There seem to have been structures, Timber and other obstacles on each side of the track, and the evidence is in almost hopeless conflict as to when and how much the engineer and the fireman could see, and when either of them could have seen train 1229 first.

Let us consider first the evidence respecting the fireman. At the time he was crossing the river bridge and until after the engine was well advanced into the first curve he could not see the standing train to the northeast because he was on the left side of the engine and it was headed north, and for some 800 feet north of the bridge the engine interposed between him and the train. After the engine had passed around the curve sufficiently to enable him to see to the northeast there was a space of upwards 2,200 to 2,400 feet to the crossing. The train was standing about 200 feet south of the Santa Fe crossing, and was about 500 feet long. It is established conclusively that there were structures and timber adjacent to the west side of the right of way that would to some extent cut off the fireman's view. But the evidence is in irreconcilable conflict as to the point where he could have seen the train first, varying from the entire

2,200 or 2,400 feet down to 400 feet, at which it seems established he did see the standing train first.

[fol. 261] There is proof of eyewitnesses that as train 630 approached train 1229 from the rear, the fireman was in the left window looking at a carnival northwest of the tracks, and that he did not look in the direction of the forward train until about 400 feet from it, at which time he left his seat, crossed to the right side of the cab and jumped. The fireman contradicted this flatly by asserting he was looking ahead down the tracks. He insists he could not and did not see the forward train until about 400 feet from it, at which time he called to the engineer, left his seat, crossed the cab and jumped. In a sense his testimony contradicts the eyewitnesses, but in a sense it does not. They agree with him that he first saw the forward train when about 400 feet from it, but they do not contradict him when he says he could not have seen it sooner. Their testimony merely tends to establish that he was not looking forward until he turned and saw the train. Their testimony does not contradict him about his ability to see the train sooner. The inference from their testimony is that if he had been able to see the standing train sooner, he would not have done so because his attention was directed elsewhere.

There is testimony that between the time the engine was crossing the river bridge and when it entered the first curve, there was an opportunity for the engineer to have seen the forward train for a short distance; this covered a distance of some 200 feet, but it is proven conclusively that after the engine had entered well into the first curve, a distance of 700 or 800 feet north of the bridge, the front end of the engine interposed itself in the engineer's line of vision, and he was unable thereafter to see the forward train until he was rounding the next curve. This blind space was about 1,500 or 1,600 feet. It appears to us from the record that although it was only 400 feet to the rear end of the forward train, yet the engine had not yet reached a point where the engineer could [fol. 262] see beyond it and thus see objects on the tracks. In other words, when he passed into the so-called blind space he was dependent upon the aid of the fireman for information as to what was ahead and upon the natural caution inherent in whatever circumstances he found himself to avoid striking obstacles on the track.

There was another employee of the company, the flagman on the head-end, who was riding the top of the first car be-

hind the engine. He testified the engineer and fireman both had opportunities to see the forward train in time to have brought the train to a stop, but that when he became doubtful whether they had seen it, he began to yell at them and to give the stop signal and continued so to do for about 1,000 feet, and finally abandoned the train about 100 feet before it struck the forward train. He testified he could not get to the engine, and had to depend upon yelling and hand signals, which were not heard or seen.

There is a great deal of diversity of evidence concerning the rate of speed, but all of the witnesses who were competent and who expressed an opinion were agreed that Reese could have stopped his train had he seen the forward train, or had he been warned of it earlier. This aspect of the case does not account, however, for his failure to take into consideration the likelihood of the train being in front of him as it was.

The evidence is conclusive that deceased knew that train 1229 was in front of him, and his running orders gave him all the information needed, and all that he did not know was its exact location on the tracks in front of him. His duty to keep a lookout for it and to take its position into account in operating his train was absolute.

We think the evidence rather conclusively establishes that all north-bound trains stop south of the Santa Fe crossing. They stop for two reasons: (1) to get the clear signal to cross the Santa Fe tracks; and (2) to get water for the [fol. 263] engine of the northbound train, which required setting the brakes on the train, cutting the engine loose and running several hundred feet north to a tower, during which time the remainder of the train stood still south of the crossing. That was the position and condition of train 1229, when train 630 came up behind it. Train 630 was preparing to stop to take water under the same conditions.

We now take up the rules, 99 and 93, relied upon by the parties. Rule 99 provided that whenever a train was stopped, a flagman should be sent back to warn approaching trains. Rule 93, in effect, provided that when a train stopped within yard limits it was not necessary to send back a flagman, and that second and inferior trains must move within yard limits "prepared to stop unless the main line is seen or known to be clear." The trial court took the view, and correctly so we think, that rule 93 applied here. Deceased's train was a second class or inferior train, and

the engineer knew that he was within the yard limits and had been for several hundred feet when he was warned of the train in front. His duty under rule 93 was to move his train within these yard limits prepared to stop unless he could see or know the line was clear.

From all of this evidence, we must determine whether the negligence of the company, as found by the jury, consisting of the failure of the fireman to keep a lookout and warn the engineer, or the engineer's violation of rule 93, in failing to move his train within the yard limits when he could not see or know whether the tracks were clear, and his failure to take into account the likelihood of finding the other train there, and his failure to slacken the speed of his train when warned of the impending peril, and his failure to see the train at the time when he had an opportunity so to do, solely caused the wreck, or whether they commingled and the engineer was guilty of contributory negligence only. In the first [fol. 264] or third alternative the verdict must be affirmed; under the second, the judgment must be reversed.

It is our opinion that the jury was of the belief that the engineer was guilty of negligence, a conclusion that could not be escaped, but that such negligence amounted only to contributory negligence because of the concurring negligence of the fireman. In other words, the jury believed that the fireman was negligent, and that the negligence of the fireman was substantial and had a potent effect upon the situation, and that the engineer's negligence was not a sole cause of the accident.

There are a number of decisions holding that the engineer or his representative may not recover, where the engineer is clearly negligent, by pointing out that the effect of the engineer's negligence might have been offset if the secondary members of the train crew had fully performed their duties. Louisville & N. v. Grizzard (Ala.) 189 So. 203; Hudson v. N. & W. Ry. Co., 106 W. Va. 437, 146 S. E. 525, and other cases. There are a number of decisions where the concurring acts of negligence on the part of other employees are held to be of sufficient importance to the entire situation that they will be held to be causative agencies, and recovery is permitted. Louisville & N. v. Jacobson, 218 Ala. 384, 118 So. 565; Missouri Pac. v. Jones (Tex. Com. App.) 24 S. W. (2d) 32, and other cases. See 45 U. S. C. A. 53, note 26.

We feel that the difference between those differing lines of cases is found in the determination of the likelihood of the injury occurring because of the negligence of the engineer irrespective of the concurring acts of negligence on the part of other employees. If the courts feel that the negligence of the engineer cannot be excused or minimized under the particular record, they will not permit a recovery. Whereas, if the courts feel that the concurring acts [fol. 265] of negligence of the other employees make the situations worse and put the engineer in a position where he was less likely to extricate himself from the position where his own negligence placed him, recovery is permitted. There are many things the engineer is required to do that may not be delegated, and with respect to which he cannot lessen his responsibility; and there are other duties devolving upon him that he cannot adequately discharge without the assistance of other members of the crew, and we think the present situation is one. After the engine had entered into the first curve and had protruded itself between the engineer and the standing train, it was impracticable if not impossible for him to see the standing train until his train had traveled to a point rather close to the standing train. Obviously he had to depend upon the fireman for assistance in seeing or knowing whether the track ahead was clear, and the fireman was required to help the engineer in that respect insofar as his ability and conditions permitted. The fireman was a substitute for the engineer in this situation.

The jury in this case allowed only $3,750 recovery; a rather insubstantial sum, one that would not have been reached but for considerable reduction because of the contributory negligent conduct of the engineer, and under the record we think it is justified. The conduct of the fireman was considered negligent, and the jury was justified in finding that if he had attended to his duties properly he could have discovered train 1229, and could have warned deceased in time to have enabled him to avoid the collision. On the other hand, they were amply justified in reducing the compensatory damages to be allowed to deceased's estate because of his culpable contribution, a procedure permitted under the act.

The judgment is affirmed.

Welch, V. C. J., and Osborn, Gibson, and Davison, JJ., concur.

[fol. 266] And thereafter and on the 31st day of October, 1940, the following further proceedings were had and entered of record in said cause, to-wit:

No. 36340

H. J. Jenkins, Resp.

vs.

J. M. Kurn, et al., Apps.

Now at this day the Court having seen and fully considered respondent's motion to transfer to Court en Banc, doth order that said motion be, and the same is hereby overruled.

[fol. 267] In the Supreme Court of Missouri

October Term, 1940

No. 36,340

H. J. Jenkins, Respondent,

vs.

James M. Kurn and John G. Lonsdale, Trustees, Appellants

Praecipe for Transcript

Respondent, H. J. Jenkins, in the above entitled cause, hereby calls upon the Clerk of the Supreme Court of Missouri to make up a transcript of the record in this cause to be sent to the Supreme Court of the United States.

1. Printed copy of the record in the Supreme Court, together with index.
2. Opinion of the Supreme Court of Missouri.
3. Original Motion for Rehearing.
4. Supplemental Motion for Rehearing together with Suggestions in support thereof.
5. Motion to Modify Opinion.
6. Motion for Transfer to Court En Banc.
7. Supplemental Memoranda in Support of Motion to Transfer to Court En Banc.
8. Short Form Transcript of Appeal.

9. All Record Entries in the Supreme Court.
10. This Praecipe.
11. The certificate of the Clerk authenticating the record.

Sizer and Myres, H. G. Waltner, Jr., Attorneys for Respondent.

[fol. 268] Received copy of the above, this — day of January, 1941.

——— ———, Attorneys for Appellant.

[fol. 269] STATE OF MISSOURI—Sct.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages are a full, true and correct copy of the record and proceedings, as called for in the praecipe hereto attached, in the case of H. J. Jenkins, respondent, against James M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, appellants, No. 36,340, as fully and completely as the same appear of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of the Supreme Court of Missouri, at my office in the City of Jefferson City, State aforesaid, this 18th day of January, 1941.

E. F. Elliott, Clerk, Supreme Court of Missouri.
(Seal.)

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[fol. 270] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed March 10, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Harry G. Waltner, Jr. File No. 45,081. Missouri, Supreme Court. Term No. 732. H. J. Jenkins, Petitioner, vs. James M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed January 31, 1941. Term No. 732 O. T. 1940.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 732

H. J. JENKINS,

Petitioner,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

HARRY G. WALTNER, JR.,
SIZER & MYRES,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 732

H. J. JENKINS,

Petitioner,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, H. J. Jenkins, respectfully shows as grounds for the issuance of a writ of certiorari to the Supreme Court of the State of Missouri.

A.

Summary Statement of the Material Involved.

This is an action for damages for permanent bodily injuries suffered by petitioner while acting within the scope of his duties as an employee of respondent. The action

was brought under the Federal Employers' Liability Act (45 U. S. C. A.). A trial judgment of twelve thousand dollars ($12,000) was rendered in petitioner's favor, which was reversed outright on appeal to the Supreme Court of Missouri on the theory that petitioner's failure to make the engineer of respondents' train *understand* a warning of danger on the track ahead barred any recovery at all for injuries resulting from respondent engineer's negligence. There was no dispute as to the applicability of the Federal Employers' Liability Act.

Petitioner was the fireman on a second class train, No. 630, operated by respondent, carrying freight in interstate commerce (R. 20). The engineer and conductor, who had complete charge of the train (R. 20, 33) received orders to leave Arkansas City, Kansas for Winfield, Kansas at 6:30 (R. 136-137), which was 20 minutes after respondents' train No. 1229 left the same place for the same town on the same track (R. 137). Respondents' track approaches the town of Winfield from the southwest as shown on Exhibit "A," the track making a large "S" curve before intersecting the track of the Santa Fe Railroad (running almost north and south) at a point identified as "M. P. 501" and running thus into Winfield. Respondents' train, in approaching Winfield, descended a long grade of 1% for 2¼ miles (Respondents' Exhibit 1) crossing successively the Walnut River Bridge, bridge over county road, the yard limit sign, abandoned inter-urban crossing, public road crossing adjacent to city park and track before completing the "S" curve.

Petitioner was injured on July 20, 1937 (R. 23) while it was daylight and the sun was shining (R. 114) by reason of train 630 running into the rear of train 1229 at end of the "S" curve at a point 4½ poles (176 feet per pole, R. 61) before reaching the intersection of the Santa Fe track (Exhibit "A"). Train 1229 had been left on the track by

its crew while watering the engine in Winfield. It was the established custom for northbound freight trains to pull up to the Santa Fe intersection, disconnect the engine from the cars, pull up to the water tank about two blocks north and after filling with water, back up and connect with the train and go on (R. 56, 57, 112, 113).

As respondents' train proceeded around the end of the "S" curve, petitioner for the first time could see train No. 1229 (R. 35). Petitioner could not see train No. 1229 because of the obstruction of view by a light plant (R. 28) and by trees, bushes and underbrush along the respondents' right-of-way and within forty to sixty feet of the tracks on the fireman's side (R. 28, 30, 63, 64, 65). These were in full foliage (R. 30). Petitioner could not see the caboose looking straight down the track (R. 32) and respondents' brakeman, Felton, testified that the caboose could not be seen until the trees had been passed (R. 123). Immediately upon passing the trees, petitioner shouted a warning to respondents' engineer (R. 35). Petitioner was 5 or 6 feet from the engineer when he yelled the warning (R. 37) under which circumstances the two could hear each other in an ordinary conversation (R. 76, 78). Respondents' witness testified that petitioner gave the engineer violent stop signals with his hands as he crossed the deck to jump (R. 118). The engineer did not put on the brake, but "looked like he thought I was joking him" (R. 36). When the engineer did nothing and a collision was imminent (R. 71, 74), petitioner jumped from the train (R. 37), resulting in substantial injuries (R. 41, 44, 82, 87, 89).

There is evidence in the case that the engineer had an unobstructed view of the track on which the caboose stood about 14 poles, or one-half mile, before the point of collision, and from which point the fireman could not see the track because of the curve (R. 153). This evidence was given

by respondents' witness who was called by petitioner when respondent failed to put him on the stand (R. 156).

The Supreme Court of Missouri, by its opinion, held that petitioner was not entitled to recover because, although the warning was given in "language, which if understood, would have advised the engineer of the danger," was not understood by the engineer and therefore, because there was no evidence (so the court said) that the engineer *understood* the notice, there was no "substantial evidence that plaintiff (petitioner) *notified* the engineer to go into 'emergency,'" and therefore no case was made for the jury.

Thereafter, on the 17th day of March, 1940, petitioner filed a preliminary motion for rehearing, and on the 1st day of June, 1940, filed a supplemental motion for rehearing in the Supreme Court of Missouri, which was overruled on the 28th day of June, 1940. Thereafter, on the 8th day of July, 1940, petitioner filed a motion to modify the opinion so as to direct the remanding of the case for new trial, which was supported by an extensive affidavit, which was overruled on September 4, 1940. Thereafter, on the 14th day of September, 1940, petitioner filed a motion to transfer said cause to the Supreme Court of Missouri *en banc*, which was overruled on October 31, 1940. Petitioner has therefore exhausted all remedies available save and except this Writ of Certiorari.

By this decision of the Supreme Court of Missouri, petitioner, an employee of an interstate railroad corporation, has been denied the benefits provided for him under the Federal Employers' Liability Act. If this decision is the law in cases under the Federal Employers' Liability Act, every plaintiff will have to establish, not only that a warning or signal or notice was given, *but that such warning, signal or notice was received and understood*, and any failure by a plaintiff to make such showing constitutes,

under the decision to be reviewed, primary negligence, barring *any* recovery, rather than contributory negligence reducing the amount recoverable. The court cited no authority for its decision, and indeed none can be found. The issues in the trial court were made up on the theory that respondents' engineer was negligent in failing to hear or understand the warning given, both sides including this in the instructions given (Instruction "C", R. 174 and Instruction "2," R. 168.) Failure of the fireman to give an adequate warning, or to give any warning to the engineer can, under the decisions of this Court, only constitute contributory negligence, reducing rather than barring, a recovery.

B.

Basis of Jurisdiction.

The judgment of the Supreme Court of the State of Missouri determined the rights claimed under the Federal Employers' Liability Act. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code Annotated, Title 28, Section 344, and particularly Section 344b thereof).

C.

Questions Presented.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act (April 28, 1908, Chapter 149, 35 Stat. 65, as amended August 11, 1909, c. 685, 53 Stat. 1404, 45 U. S. C. A. 51, *et seq.*):

(1) Can this Court determine from the record in this case that the engineer of the train "understood" the fireman's signal of danger ahead from the statement that, in response to the fireman's warning or signal, the engineer

turned his head and "looked like he thought I was joking him."

(2) Is a fireman, calling or signalling a warning or signal to the engineer of danger ahead, required to prove the engineer "understood" or "comprehended" the warning or signal if he uses terms or means appropriate for that purpose?

(3) Is a fireman who has given a danger warning, signal or notice to an engineer who is his superior and is in charge of the train, guilty of more than contributory negligence if the engineer fails to "understand" or "comprehend" such notice and the fireman does nothing further about it and is injured because of the failure of the engineer to "understand" an appropriate warning and act thereon, stopping the train.

D.

Reasons Relied On for the Allowance of the Writ.

(1) The Federal Employers' Liability Act provides that contributory negligence shall not bar recovery, but shall reduce the amount recoverable by a certain proportion. This is applicable to the instant case because the Supreme Court of Missouri, by holding petitioner must prove the engineer understood the warning and signal, necessarily determines that a failure to give a warning or signal which is understood, or a failure to repeat such warning or signal until it is understood, constitutes sole primary negligence barring a recovery. As the engineer was under an absolute duty to know the way ahead was clear, and at one point could have personally seen that the way was not clear, and as he should, under the circumstances of the case, as contended for by respondents, anticipated the probability of a warning or signal from petitioner, the decision of the Supreme Court of Missouri is erroneous and should be set

aside. Even that court could find no authority upon which to base its decision.

(2) The Supreme Court of Oklahoma, in the case of *Kurn et al., Trustees,* v. *Reese, Administratrix,* No. 29456, decided September 24, 1940 (not yet reported, but appearing in The Journal, issued by the Oklahoma Bar Association, September 28, 1940, Vol. 11, No. 26, pp. 947-950), has held that the administratrix of the engineer of this train of which your petitioner was the fireman, was entitled to judgment under the Federal Employers' Liability Act, but that the jury properly reduced the amount recoverable because of the negligence attributable to said engineer. Thus, we have an erroneous application of the Federal law in petitioner's case, depriving petitioner of any benefits under the Federal Act, while the Supreme Court of Oklahoma, recognizing that there was negligence both on the part of petitioner and the engineer, has granted to the engineer's widow an award.

(3) The principle which has been laid down by the Supreme Court of Missouri in the instant case is far reaching in its effect, and if applied to other similar cases (and there is no reason to believe it will not be so applied), a very substantial group of individuals intended to be beneficiaries of the Federal Employers' Liability Act will be denied all benefit of that Act.

(4) Although it is recognized that this Court has been occupied with matters of considerable moment in the past two years, it has been the subject of comment that no decisions involving the Federal Employers' Liability Act have been rendered for over two years. As a result thereof, inferior courts have proceeded to determine all issues under this Federal law without the supervising influence of this Court, with the result that they have strayed away from the principles laid down by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under seal of this Court, directed to the Supreme Court of Missouri, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of *H. J. Jenkins, Respondent,* v. *James M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company,* a corporation, No. 36340, to the end that this cause may be reviewed and determined by this Court, as provided for in the statutes of the United States, and that the findings of said Supreme Court to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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Monett, Missouri,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 732

H. J. JENKINS,

Petitioner,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES, OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in *H. J. Jenkins, Respondent,* v. *Kurn and Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, Appellants,* is reported in 144 S. W. (2d) 76 (not yet reported in official reports).

II.

Statement as to Jurisdiction.

The petitioner, in support of the jurisdiction of this Court to review the above cause on writ of certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code, Title 28, Section 344), which provides in part as follows: (Section 344b)

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

B.

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered on May 17, 1940 (R. 185). Petition for Rehearing was duly filed (R. 192). On June 28, 1940, Motion for Rehearing was denied (R. 227). Motion to Modify Opinion was duly filed (R. 227), and on September 4, 1940 overruled. Motion to Transfer Cause to the Supreme Court of Missouri *en banc* was duly filed and denied October 31, 1940 (R. 246), and the judgment then became final. *State ex Rel. McGrew Coal Company* v. *Ragland*, 339 Mo. 452, 456, 458, 97 S. W. (2d) 113.

C.

Nature of Case and Ruling Below.

Suit was brought under the Federal Employers' Liability Act, and there was no issue as to petitioner being engaged in interstate transportation and governed by the provisions of that Act. Injuries were sought to be recovered on the basis of the negligence of the engineer of the train on which petitioner was a fireman, to hear or to understand the notice, signal or warning given by petitioner of danger ahead (being another train standing on the track), and the negligence of said engineer in failing to promptly and immediately stop the train, which could have been done, in time to have avoided the collision. The issues were presented to the jury by both sides on this theory, and upon reviewing the judgment for petitioner, the Supreme Court, ignoring the fact that petitioner's only duty was to give to the engineer a reasonable notice, signal or warning, and ignoring the fact that petitioner's failure to have done this could only constitute contributory rather than primary negligence, reversed the judgment outright without a remanding of the case, thus entirely depriving petitioner of the benefits of the Act.

D.

Cases Believed to Sustain Jurisdiction.

The action of the Supreme Court in this case is, so far as we have been able to determine, without precedent, either in this State or in other States. However, it is clear that no one entitled to the benefits of the Federal Employers' Liability Act can be deprived thereof by a decision which is not reviewable by this Court. The following decisions sustain petitioner's assertion of jurisdiction in this Court:

Brady v. *Terminal Railroad Association*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 431;

Toledo Railroad Company v. *Slavin,* 236 U. S. 454, 35 S. Ct. 306, 59 L. Ed. 671;
Chicago Railroad Company v. *Devine,* 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140;
Seaboard Airline Railroad Company v. *Horton,* 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

III.

Statement of the Case.

In the interest of brevity, petitioner does not here make a statement of the case, since the full statement has been given under heading "A" in the Petition for Writ of Certiorari.

IV.

Specification of Errors.

(1) The court erred in holding that the failure of respondents' engineer to understand or comprehend the signal, warning or notice given, barred petitioner's right to recovery.

(2) The court erred in determining from the evidence that there was not a scintilla of evidence in the record that respondents' engineer understood or comprehended the notice, warning or signal given him by petitioner.

(3) The court erred in failing to hold that petitioner's acts, or failure to act, could constitute but contributory negligence, reducing rather than barring petitioner's recovery of damages for the injury sustained.

(4) The court erred in failing to hold that petitioner's only duty and responsibility was to advise respondents' engineer by means appropriate to that end, that there was danger ahead and that the train should be stopped.

(5) The court erred in failing to hold that respondents' engineer was primarily and absolutely required, under respondents' rules, to have the train under control immediately prior to and at the time of the collision, and that therefore no act or failure to act on the part of the petitioner could constitute more than contributory negligence.

V.

Summary of Argument.

(1) Respondents' engineer understood the notice, warning or signal but failed to apply the brakes and stop the train. When the petitioner shouted warning to respondents' engineer, he turned his head toward petitioner and "Looked like he thought I was joking him" (R. 36). Although the Supreme Court of Missouri said there wasn't a scintilla of evidence that respondents' engineer understood the warning, that evidence is in the record and this Court is not concluding a finding of fact or a mixed finding of law and fact made by a state court when reviewing a state court decision denying a claimed Federal right.

Northern Ry. Co. v. *State of Washington,* 300 U. S. 154; 57 S. Ct., 397; 81 L. Ed. 573;

Norris v. *Alabama,* 294 U. S. 587; 55 S. Ct. 579; 59 L. Ed. 1074;

Johnson Oil Co. v. *Oklahoma,* 290 U. S. 158; 54 S. Ct. 152; 78 L. Ed. 238.

The warning being given in an appropriate manner, which is conceded in the opinion below, and respondents' engineer having understood and comprehended it but disbelieving it, and failing to act upon it, respondents must answer in damages for such negligence.

(2) The Supreme Court of Missouri actually holds that petitioner is guilty of negligence which is the sole proxi-

mate cause of the injury complained of because the respondents' engineer failed to understand the warning given him of the danger ahead. This Court will look through the veil to the substance.

Northern Ry. Co. v. *Washington*, 300 U. S. 154, 57 S. Ct., 397, 81 L. Ed. 573;

Central Vermont Ry. Co. v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

Petitioner was but the fireman on the train and had neither the authority nor the physical means to slow or stop the train. Under the rules, the engineer and conductor were responsible for the train, and petitioner had no duties under the rules but to assist the engineer. Such being the case, petitioner's negligence could not have been the *sole* proximate cause of the collision. Had petitioner wholly failed to warn respondents' engineer of the danger, this could have been but contributory negligence on petitioner's part, for the engineer had an absolute duty to know the track was clear. As a warning was given, at most it was inadequate (assuming it was petitioner's fault that the engineer did not understand and further assuming it was inadequate, although the lower court held it was appropriate for the purpose) and so could constitute but contributory negligence, reducing the amount of, but not barring a recovery by petitioner.

Gillis v. *Atlantic Coast Line Ry. Co.*, 175 S. Ct. 223, 179 S. E. 62, Certiorari Denied, 294 U. S. 718, 55 S. Ct. 545, 79 L. Ed. 125;

Washington and O. D. Ry. Co. v. *McPherson*, 29 F. (2d) 989, Certiorari Denied, 278 U. S. 610, 49 S. Ct. 13, 75 L. Ed. 535;

Jones v. *Administrator*, 171 Ky. 11, 186 S. W. 877;

Tate v. *Chicago, M. St. P. & P. R. R. Co.*, 172 Wash. 33, 19 Pac. (2d) 137, Certiorari Denied, 290 U. S. 631, 54 S. Ct. 50, 78 L. Ed. 549;

Rocco v. *Lehigh Valley Ry. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743;
Union Pacific R. R. Co. v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751;
Friese v. *Chicago, Burlington & Quincy R. R. Co.*, 290 Mo. 501, 235 S. W. 97, 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131;
Pennsylvania v. *Sheeley*, 221 Fed. 901;
Davis v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212;
Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 41 S. Ct. 91, 73 L. Ed. 224;
Lockridge v. *Western & Atlantic R. R. Co.*, 170 Ga. 208, 152 S. E. 474, Certorari Denied, 281 U. S. 762, 50 S. Ct. 461, 74 L. Ed. 1171;
Miller v. *Central Ry. Co. of N. J.*, 58 F. (2d) 635;
Kurn et al. v. *Reese*, The Journal (Oklahoma Bar Association) Sept. 28, 1940; Vol. 11, No. 26, p. 547 (Not yet otherwise reported). See Appendix A.

VI.

ARGUMENT.

1.

Petitioner takes sharp issue with the lower court's conclusion that there is no evidence of respondents' engineer's understanding of the warning, signal or notice given. There is clear evidence in the record that he *heard* petitioner shout to stop the train, and petitioner's testimony that respondents' engineer looked as thought he thought petitioner were joking, is a clear statement of fact relating the expression on the engineer's face, which is definite and specific evidence of the engineer's understanding and comprehension, but disbelief. It is difficult to follow the reasoning of the lower court on this point, for they assume the engineer's

inactivity is due to lack of understanding from the fact that he did not, at the time of receiving the warning, apply the emergency brake, solely because they assume he did not intend self-destruction. This assumes the engineer knew that failure to apply the brake would result in his death (there is no evidence in the record to support this assumption) and of course, ignores the plain statement of fact as to the engineer's response to the warning being one of disbelief and it also ignores an equally strong presumption which is as equally self-evident, and that is that the engineer became confused, or to put it commonly, got "buck fever," and did not apply the emergency brake until it was too late. No authorities need be cited to sustain petitioner's contention that if the warning, signal or notice were understood, that the judgment and decision of the lower court should be reversed.

That this Court will review the record on such point is well established by the decisions of this Court. When any State court denies a claim to Federal right, this Court has many times held that it is not concluded by any finding of fact or by any mixed finding of law and fact, made by the State court.

Northern Ry. Co. v. *State of Washington,* 300 U. S. 154, 57 S. Ct., 397, 81 L. Ed. 573;

Norris v. *Alabama,* 294 U. S. 587, 55 S. Ct. 579, 59 L. Ed. 1074;

Johnson Oil Co. v. *Oklahoma,* 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238.

This Court, under the above decisions, will not permit any State court decision to stand, which by placing a technical meaning on the word "notify" requires and demands of beneficiaries of the Federal Employers' Liability Act, a burden greater than that required under the law. Such is the effect of the decision of the Supreme Court of Missouri

in the instant case, for while apparently holding petitioner to a technical construction of that term as used in petitioner's instructions, the Supreme Court of Missouri has not been so careful to hold respondents to the theory upon which they tried this case in the trial court. It will be recalled that in the statement of the case, reference is made to the fact that respondents joined with petitioner in the trial court in presenting this case to the trial court and to the jury on the theory that the engineer's failure to understand an appropriate warning was negligence. The respondent instructed the jury on that point (R. 174), directing a verdict for defendants (respondents here) if, among other things, they found the engineer "was not negligent in failing to hear or understand said warning."

The substance of the decision in this case is that the failure of respondents' engineer to understand and comprehend a warning given him by petitioner using appropriate means constituted sole primary negligence on the part of petitioner, barring completely petitioner's action. This is in direct conflict with the construction placed upon the Federal Employers' Liability Act by this Court, as such failure can only constitute contributory negligence.

As heretofore urged, this Court will go into the record of the case when a Federal right has been denied. It has always been held that this Court would pass upon the substance of a contention and would brush aside any decision not based on substance defeating a claimed Federal right.

Northern Ry. Co. v. *State of Washington, supra;*
Central Vermont Ry. Co. v. *White,* 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

In considering the substance of this case, the lower court, without authority or precedent, has denied petitioner's rights under the Federal Employers' Liability Act. Without conceding that respondents' engineer did not "under-

stand'' the warning, we urge that in no other case has this ''understanding'' of a warning been required. In the case of *Gillis* v. *Atlantic Coast Line Ry. Co.*, 175 S. C. 223, 179 S. E. 62, the Supreme Court of South Carolina recognizes that under the Federal Employers' Liability Act, the question of contributory negligence is peculiarly within the province of the jury, and in that case held that the jury was to decide the right of Gillis to benefits under the Act on the basis of whether or not he ''gave the proper signal to the engineer to stop the train.'' In that case, as in the instant case, the engineer failed to stop the train, but the court held that the jury was the sole judge of the issues, recognizing that the only obligation on the part of Gillis was to give the signal, not to insure its receipt and understanding by the engineer. l. c. S. E. 64. This court refused to review that decision (294 U. S. 718, 55 S. Ct. 545 and 79 L. Ed. 125).

In the case of *Washington and Old Dominion Ry. Co.* v. *McPherson*, 29 F. (2d) 989, the court of appeals of the District of Columbia had for consideration a case very similar to the instant case in respect to the facts. McPherson was a brakeman on a work train. In his operations he had been taken away from the immediate vicinity of his own train and was directed by appropriate authority to return to it. In doing so, he was directed to take passenger train #12, which he boarded, reporting to the motorman, and telling the motorman to look out for the work train ahead. Passenger train #12 stopped at the next stop and McPherson alighted to obtain information by wire as to a more exact location of his work train. After discharging and taking on passengers, train #12 pulled out. McPherson approached the train, standing with his right foot near the rail, and waving a red flag, which was the signal to stop (p. 991). Patterson, the engineer, looked at McPherson, but did not slow the train or otherwise give any indication of seeing McPherson, but there was nothing to prevent him from see-

ing the red flag. However, he gave no indication of any understanding or comprehension of the stop signal, McPherson, thinking the train not going too fast to board, and being required to board it to follow the instructions given him, attempted to jump on the train, missed the step and was severely injured. In no place in this case will be found any finding that the motorman or engineer of the train understood or comprehended the warning, but it is reasonably and fairly required that the motorman had a duty to see the red flag when it was waved close to the track. As under the rules, red was a danger signal, trainmen and others were required to heed it. This Court refused to review the decision in that case, denial of the application for certiorari being recorded at 278 U. S. 610, 49 S. C. 13, 75 L. Ed. 535.

See also *Jones* v. *Administrator*, 171 Ky. 11, 186 S. W. 877; *Tate* v. *Chicago, M. St. P. & P. R. R. Co.*, 172 Washington 33, 19 Pac. (2d) 137; Certiorari Denied, 290 U. S. 631, 54 S. Ct. 50, 78 L. Ed. 549.

The cases of *Rocco* v. *Lehigh Valley Ry. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743 and *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751, and *Friese* v. *Chicago, Burlington & Quincy R. R. Co.*, 290 Mo. 501, 235 S. W. 97, 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131, clearly show that your petitioner was guilty only of contributory negligence. In these cases, the principle has been laid down that where it is necessary for an employee to act through or with others, and in connection therewith the employee is negligent as a result of which injuries occur, yet if those injuries are due in whole or in part to the act or failure to act on the part of others, whether they be officers, agents or employees, the first employee's negligence but contributes to the injury or damage, and as a result the jury must reduce his damages in proportion to his contribution.

In the instant case, your petitioner was but an assistant to respondents' engineer. Under the rules in evidence, the

engineer and the conductor were in charge of the train. In them rested the authority to direct its movements. Your petitioner had no authority whatever to check, slow down or stop the progress of the train. Therefore, no matter what he might have done, he was wholly dependent upon respondents' engineer to take appropriate action to avert injury and damage. In the *Rocco* and *Hadley* cases, *supra*, this Court has determined that in cases wherein the plaintiff did not have the means at hand or the authority to avert the damage or injury, that he was guilty of but contributory negligence and entitled to recover. In the *Friese* case, this Court dealt with a situation similar as to the physical facts to that before us here. Suit was brought to recover for the death of the engineer who had proceeded to cross a railroad grade crossing, operating a Burlington freight train which was run into at the crossing by a Wabash train coming from the left into the intersection. As the Wabash train was approaching from the left, the engineer was wholly unable to personally observe the approaching train, and relied upon his fireman for warning or signal. It was strongly urged that the fireman was negligent in failing to properly warn the engineer and that as the engineer was wholly dependent upon the fireman to advise him of the danger, recovery could be had under the Federal Employers' Liability Act. After referring to a statute which placed on the engineer the duty of ascertaining that the way was clear before entering the crossing, this Court held that this was a positive duty of the engineer which he could not escape, and that his failure constituted the sole and primary cause of the injury. In the instant case the rules of the respondent specifically require that when the train is within yard limits (this collision occurred within the yard limits), it must be under control and that the *engineer* must know that the way ahead is clear. Under such circumstances, the duty rested on respondents' engineer to know that the way

ahead was clear before proceeding, and his act in proceeding as he did constituted negligence. Therefore, the instant collision could not possibly be due to the sole primary negligence of your petitioner.

In the case of *Pennsylvania* v. *Sheeley*, 221 Fed. 901, the Circuit Court of Appeals, 6th Circuit, passed upon a case very similar in fact to the instant case. Sheeley was the fireman. His engineer disregarded cautionary and stop signals and ran into a train standing on the track, resulting in the death of the engineer. It was urged that the rules and practice of the company placed upon Sheeley the duty to cooperate with the engineer in observing signals and in obeying them. It was urged that when the engineer disobeyed the warning, Sheeley should have found out why. The court there stated (p. 904):

> "The proofs * * * show that Sheeley did nothing in this direction until it was too late * * * At most, the defendant's proofs tended to make a case of contributory negligence and thus to diminish the damages."

No requirement was made in that case that the fireman, to recover, must prove the engineer "understood" the signals or "call". There is no evidence in that case that the engineer "understood" the signals or "call", in fact the engineer proceeded without any indication of "understanding" until it was too late to do anything about it just as he did in the instant case.

The cases of *Davis* v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33; 69 L. Ed. 212 and *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139; 73 L. Ed. 224; 41 S. Ct. 91, are not applicable to the instant case. These cases are distinguishable on two logical grounds: (1) the individual seeking recovery, or in respect to whom recovery was sought, was in actual command and had both the means at hand and the authority to determine the movement of the train, and (2) the indi-

vidual seeking recovery, or in respect to whom recovery was sought, was guilty of the violation of a specific order or rule having unquestioned application and requiring definite and specific action which could be only satisfied by doing a particular thing in a particular way.

In respect to the first point, the Supreme Court of Georgia, in the case of *Lockridge* v. *Western & Atlantic R. R. Co.*, 170 Ga. 208; 152 S. E. 474, Certiorari Denied 281 U. S. 762, 50 S. Ct. 461, 74 L. Ed. 1171 pointed out that these cases had no application as applied to a fireman, such an employee "being a mere underling whose relation to the operation of the train was secondary" (Ga. p. 212) and that the fireman could recover on account of the negligence of the engineer in charge of the train, even if "the fireman may also have been negligent in failure to perform his duty in assisting the engineer in operating the train." In this connection, it cannot be overemphasized that respondents' engineer was guilty of the grossest negligence in failing to act upon the warning given by petitioner. It should be remembered that the train was going around a left-hand curve and that thereby the fireman knew that if danger was ahead he would most likely receive a signal or warning from petitioner. Also, respondents proved that it was usual and customary for trains to stop at the point where the collision occurred, so that water could be taken on by the engine on down the track. Therefore, respondents' engineer, being fully advised of it and being unable to see from his side of the engine at this point, should have been awaiting a message on that subject. Further, it was established by respondents that the respondents' engineer knew that the extra train was just twenty minutes ahead and therefore could reasonably anticipate that at this particular point there might be danger that the extra train had not yet pulled out. Add to this the fact which came out upon examination of one of respondents' wit-

nesses, (such information being a surprise to petitioner) that respondents' engineer could have seen, had he been observing, the train standing at the crossing when petitioner's train was back about one-half mile from the crossing. Such view on the part of the engineer was a view down the track rather than across the fields. See also petitioner's affidavit attached to the Motion to Modify (R. 230). All of these factors definitely indicate the negligence of respondents' engineer and all but the last of them are factors which should have prompted respondents' engineer to be receptive to any kind of a signal warning or notice from your petitioner.

In the *Hadley* case, *supra,* deceased had been a brakeman on a freight train, which, while standing on the main line was hit from the rear by another train. It was urged that if deceased had complied with the rules and gone back to warn the following train by torpedoes and lights, the accident would not have occurred.

In this case, Mr. Justice Holmes stated, (U. S. 333, L. Ed. 775):

> "But it is said that, in view of the defendants' conduct, the only approximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another, when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

Here too, we must look at the situation as a "practical unit." All of the factors above considered, together with

the testimony that petitioner and the engineer could carry on an ordinary conversation in the cab, being only five feet apart (R. 37), and that the engineer's hearing was normal (R. 76-78) and that petitioner spoke in a very loud voice, shouting (R. 35, 36), it is inconceivable that only the grossest negligence on the part of the engineer is a satisfactory explanation of his conduct.

In both of the foregoing cases, violation of rules was involved. From these cases and comparing these cases with the *Davis* and *Caldine* cases, *supra*, it appears that there is clearly a distinction in respect to the type of rules which, when violated, constitute a bar to the action rather than contributory negligence. As stated by the Circuit Court of Appeals, 2nd Circuit, in the case of *Miller* v. *Central Ry. Co. of N. Jersey*, 58 F. (2d) 635, 637:

> "All these decisions involved specific precautions for specific occasions; the stopping of a train at a given spot until another passed or until the track was clear. No doubt the doctrine is not confined to train movements; * * * but it does not seem to us to extend to rules generally enjoining caution or responsibility—in spite of some of our language to the contrary * * * If it did, an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law makes a condition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; * * *"

In the *Davis* and *Caldine* cases, there was only one way that those orders and rules could be obeyed and there was no opportunity for the exercise of any discretion or judgment in connection therewith. In the instant case, however, there are many ways in which the warning, signal or notice might be given. In fact, the evidence showed that it was given in two ways; first, by a shouted warning to put on

the emergency brake (R. 35, 36, 77) and second, by the giving of violent stop signals with the arms (R. 118), either of which signals are recognized as being adequate and sufficient. However, there are many other ways in which the rule could have been complied with, and therefore it is wholly unreasonable to say in the instant case that the failure to give the warning in a particular way should bar petitioner's action. Whether or not additional or different warnings had been given and with different results, is entirely speculative and presents a situation comparable to that in the *Rocco* case, *supra*, wherein it was determined that even if the inquiry had been made complying with the rule, there could be no logical conclusion reached that a different result might have come about. The decision in this case presents a situation suggested in the *Miller* case, *supra*. Plaintiff did perform an act, warning, signalling or notifying respondents' engineer of the danger. If the doing of that act was not quite sufficient or if it were done in a manner not quite effective, all that petitioner can be guilty of is failing to perform to perfection a duty which is required from a very general rule and a duty in respect to which there is no measuring stick by which its adequacy or sufficiency can be judged. Accordingly, petitioner urges that the law in Missouri, as established by the opinion in the instant case, entirely vitiates the Federal Employers' Liability Act in that it eliminates the direction in that act that contributory negligence shall reduce but not deny damages.

The situation in the instant case is particularly worthy of consideration of this Court in that the Supreme Court of Oklahoma, in the case of *Kurn et al., Trustees*, v. *Reese* (not yet reported, but appearing in The Journal issued by the Oklahoma Bar Association, September 28, 1940, Vol. 11, No. 26, pp. 947-948-949-950), has passed upon the right of the engineer's administratrix to recover for

the death of the engineer. The only issue before the Oklahoma Supreme Court was the propriety of the overruling of the defendant's demurrer to the plaintiff's evidence. In this case, while not admitting that the engineer was guilty of negligence, the point presented was whether or not the negligence of the fireman in not giving the engineer warning was or was not the primary cause of the accident. The respondents herein defended that case and "based the defense upon the alleged primary negligence of the engineer in failing to observe a special rule with respect to keeping the train under control." In that case, as in the case under consideration, "the evidence is in almost hopeless conflict as to when and how much the engineer and fireman could see, and when either of them could have seen train 1229 first." The Supreme Court of Oklahoma, in ruling this question, stated:

> "The evidence is conclusive that deceased knew that train 1229 was in front of him, and his running orders gave him all the information needed, and all that he did not know was its exact location on the tracks in front of him. His duty to keep a look-out for it and to take its position into account in operating his train was absolute."

The court held that in this particular case there was negligence, both on the part of the fireman and the engineer, and stated:

> "It is our opinion that the jury was of the belief that the engineer was guilty of negligence, a conclusion that could not be escaped, but that such negligence amounted only to contributory negligence because of the concurring negligence of the fireman. In other words, the jury believed that the fireman was negligent, and that the negligence of the fireman was substantial and had a potent effect upon the situation, and that the engineer's negligence was not a sole cause of the accident."

If there was negligence on the part of the engineer in that case, there must also be in this case. After all, it was the same collision. If negligence occurred, it took place, whether petitioner or the engineer's administratrix is seeking to recover.

In view of the decisions of this Court construing the Federal Employers' Liability Act, it is a travesty for the decision of the Supreme Court of Oklahoma to allow damages to the engineer's administratrix, while under this erroneous decision of the Supreme Court of Missouri the fireman is denied any recovery for the injuries which he sustained. It appears certain that such inconsistencies in the law should be supervised and controlled, and the only authority for such supervision and control rests in this Court. It is, of course, evident that this Court has been occupied with matters of substantial moment during the past few years. However that may be, with conditions as they are in this country and throughout the world, it must not be said that the common man be shut out from the benefit of laws because the Supreme Court of the United States has not the time to pass upon a just and meritorious case. The last case which this Court has decided involving the Federal Employers' Liability Act is the case of *Great Northern Railway Co.* v. *Leonidas*, decided November 7, 1938, well over two years ago. It is inconceivable that there have not been worthy cases presented to this Court under the Federal Employers' Liability Act since that date, but nevertheless, this Court has apparently not taken jurisdiction in any of these cases. May we respectfully urge the careful consideration by the court of the instant case, to the end that justice may be done where justice is badly needed, and to the further end that the inferior courts of the United States will recognize and realize that the Supreme Court is not too busy to supervise the construction

of the Federal Employers' Liability Act when a flagrant case of misconstruction is presented to it.

Respectfully submitted,

HARRY G. WALTNER, JR.,
For Petitioner.

SIZER & MYRES,
Monett, Missouri,
For Petitioner.

APPENDIX A.

No. 29456.

KURN ET AL., *Trustees*,

v.

REESE, *Adm'x.*

Sept. 24, 1940.

Date Mandate Issue ——.

(Syllabus.)

MASTER AND SERVANT—Action under Federal Employers' Liability Act for wrongful death of engineer—Verdict for plaintiff sustained on theory that collision was result of concurring acts of negligence of fireman and engineer.

Notwithstanding the fact that an engineer is primarily charged with the duty to operate the engine pulling a train in a safe manner; and also notwithstanding the fact that standing orders and operating rules require a more cautious rate of speed at some times and places than others, yet where the lines of railroad tracks are curved so that for considerable distances the engineer has a view of only restricted distances ahead and by custom is dependent upon the fireman to keep a lookout, and where the evidence respecting whether the fireman did keep a lookout and inform the engineer of the presence of another train standing ahead, as the engineer had a right to rely upon him to do, is conflicting, the verdict in favor of the personal representative of the engineer to the effect that the accident was the result of the concurring acts of negligence of the fireman and engineer will be affirmed, the engineer's negligence being held, in effect, to be contributory only and not the proximate cause of the accident. 45 U. S. C. A. 53.

* * * * * * *

Appeal from District Court, Garfield County; J. W. Bird, Judge.

Action to recover damages for wrongful death under Federal Employers' Liability Act by Pearl C. Reese, administratrix of estate of Howard Reese, against J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Jamison, of St. Louis, Mo., and Cruce, Satterfield & Grigsby, of Oklahoma City for plaintiffs in error.

Ratner, McAlister & Mattox, of Parsons, Kan., and Simons, McKnight, Simons, Mitchell & McKnight, of Enid, for defendant in error.

BAYLESS, *C. J.:*

Mrs. Pearl Reese, administratrix of the estate of Howard Reese, deceased, brought an action in the district court of Garfield county to recover money damages for the death of deceased, an engineer, caused by the negligence of J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, his employer, and the defendants appeal from a verdict of the jury in favor of plaintiff.

This action is admittedly governed by the Employers' Liability Act, 45 U. S. C. A. 51 *et seq.*, and the decisions of the Federal courts are decisive when applicable.

There is but one proposition presented by defendants, and it involves the alleged error of the trial judge in overruling defendants' demurrer to the plaintiff's evidence. The arguments of the parties are directed to this point: admitting that the deceased was guilty of negligence, the negligence of the fireman in not giving him warning was or was not the primary cause of the accident. The plaintiff based her cause of action on the negligence of the crew of the forward train to observe rule 99, and on the negligence of the fireman in failing to keep a lookout on his side of the engine and track; and the defendants based the defense upon the alleged primary negligence of the engineer in failing to observe a special rule with respect to keeping the train under control. We do not mean to say the plaintiff admits negligence on the part of

the deceased, but rather she says that the question of fact of the fireman's negligence and its effect upon the incident is such that it must be submitted to the jury and that the deceased's negligence, if any, is not an absolute defense but a matter to be considered in mitigation of the damages.

Deceased and his fireman were the engine crew on train No. 630, which was traveling generally north, and following about 20 minutes behind train No. 1229. The tracks coming from the south into Winfield, Kan., crossed Walnut river almost due north, and about 400 feet north of the bridge begins a 5° 21′ curve to the east, 760 feet in length, after which the track ran in a straight line, in a northeasterly direction for 1,140 feet, after which begins a curve 6° 11′ to the northwest, about 900 feet in length, after which the track runs in a straight line for about 200 feet in a northwesterly direction and crosses the tracks of the Atchison, Topeka & Santa Fe Railway Company. Thus between Walnut River and the Santa Fe tracks on the north, some 3,200 or 3,300 feet away, there is what may be called an S curve. As we understand the record, there is a slight down grade from the river northward. There seem to have been structures, timber and other obstacles on each side of the track, and the evidence is in almost hopeless conflict as to when and how much the engineer and fireman could see, and when either of them could have seen train 1229 first.

Let us consider first the evidence respecting the fireman. At the time he was crossing the river bridge and until after the engine was well advanced into the first curve he could not see the standing train to the northeast because he was on the left side of the engine and it was headed north, and for some 800 feet north of the bridge the engine interposed between him and the train. After the engine had passed around the curve sufficiently to enable him to see to the northeast there was a space of upwards 2,200 to 2,400 feet to the crossing. The train was standing about 200 feet south of the Santa Fe crossing, and was about 500 feet long. It is established conclusively that there were structures and timber adjacent to the west side of the right of way that would to some extent cut off the fireman's

view. But the evidence is in irreconcilable conflict as to the point where he could have seen the train first, varying from the entire 2,200 or 2,400 feet down to 400 feet, at which it seems established he did see the standing train first.

There is proof of eyewitnesses that as train 630 approached train 1229 from the rear, the fireman was in the left window looking at a carnival northwest of the tracks, and that he did not look in the direction of the forward train until about 400 feet from it, at which time he left his seat, crossed to the right side of the cab and jumped. The fireman contradicted this flatly by asserting he was looking ahead down the tracks. He insists he could not and did not see the forward train until about 400 feet from it, at which time he called to the engineer, left his seat, crossed the cab and jumped. In a sense his testimony contradicts the eyewitnesses, but in a sense it does not. They agree with him that he first saw the forward train when about 400 feet from it, but they do not contradict him when he says he could not have seen it sooner. Their testimony merely tends to establish that he was not looking forward until he turned and saw the train. Their testimony does not contradict him about his ability to see the train sooner. The inference from their testimony is that if he had been able to see the standing train sooner, he would not have done so because his attention was directed elsewhere.

There is testimony that between the time the engine was crossing the river bridge and when it entered the first curve, there was an opportunity for the engineer to have seen the forward train for a short distance; this covered a distance of some 200 feet, but it is proven conclusively that after the engine had entered well into the first curve, a distance of 700 or 800 feet north of the bridge, the front end of the engine interposed itself in the engineer's line of vision, and he was unable thereafter to see the forward train until he was rounding the next curve. This blind space was about 1,500 or 1,600 feet. It appears to us from the record that although it was only 400 feet to the rear end of the forward train, yet the engine had not yet reached a point where the engineer could see beyond it and thus see objects on the tracks. In other words, when he passed into

the so-called blind space he was dependent upon the aid of the fireman for information as to what was ahead and upon the natural caution inherent in whatever circumstances he found himself to avoid striking obstacles on the track.

There was another employee of the company, the flagman on the head-end, who was riding the top of the first car behind the engine. He testified the engineer and fireman both had opportunities to see the forward train in time to have brought the train to a stop, but that when he became doubtful whether they had seen it, he began to yell at them and to give the stop signal and continued so to do for about 1,000 feet, and finally abandoned the train about 100 feet before it struck the forward train. He testified he could not get to the engine, and had to depend upon yelling and hand signals, which were not heard or seen.

There is a great deal of diversity of evidence concerning the rate of speed, but all of the witnesses who were competent and who expressed an opinion were agreed that Reese could have stopped his train had he seen the forward train, or had he been warned of it earlier. This aspect of the case does not account, however, for his failure to take into consideration the likelihood of the train being in front of him as it was.

The evidence is conclusive that deceased knew that train 1229 was in front of him, and his running orders gave him all the information needed, and all that he did not know was its exact location on the tracks in front of him. His duty to keep a lookout for it and to take its position into account in operating his train was absolute.

We think the evidence rather conclusively establishes that all northbound trains stop south of the Santa Fe crossing. They stop for two reasons: (1) to get the clear signal to cross the Santa Fe tracks; and (2) to get water for the engine of the northbound train, which required setting the breaks on the train, cutting the engine loose and running several hundred feet north to a tower, during which time the remainder of the train stood still south of the crossing. That was the position and condition of train 1229, when train 630 came up behind it. Train 630 was preparing to stop to take water under the same conditions.

We now take up the rules, 99 and 93, relied upon by the parties. Rule 99 provided that whenever a train was stopped, a flagman should be sent back to warn approaching trains. Rule 93, in effect, provided that when a train stopped within yard limits it was not necessary to send back a flagman, and that second and inferior trains must move within yard limits "prepared to stop unless the main line is seen or known to be clear." The trial court took the view, and correctly so we think, that rule 93 applied here. Deceased's train was a second class or inferior train, and the engineer knew that he was within the yard limits and had been for several hundred feet when he was warned of the train in front. His duty under rule 93 was to move his train within these yard limits prepared to stop unless he could see or know the line was clear.

From all of this evidence, we must determine whether the negligence of the company, as found by the jury, consisting of the failure of the fireman to keep a lookout and warn the engineer, or the engineer's violation of rule 93, in failing to move his train within the yard limits when he could not see or know whether the tracks were clear, and his failure to take into account the likelihood of finding the other train there, and his failure to slacken the speed of his train when warned of the impending peril, and his failure to see the train at the time when he had an opportunity so to do, solely caused the wreck, or whether they commingled and the engineer was guilty of contributory negligence only. In the first or third alternative the verdict must be affirmed; under the second, the judgment must be reversed.

It is our opinion that the jury was of the belief that the engineer was guilty of negligence, a conclusion that could not be escaped, but that such negligence amounted only to contributory negligence because of the concurring negligence of the fireman. In other words, the jury believed that the fireman was negligent, and that the negligence of the fireman was substantial and had a potent effect upon the situation, and that the engineer's negligence was not a sole cause of the accident.

There are a number of decisions holding that the engineer or his representative may not recover, where the en-

gineer is clearly negligent, by pointing out that the effect of the engineer's negligence might have been offset if the secondary members of the train crew had fully performed their duties. Louisville & N. *v.* Grizzard (Ala.) 189 So. 203; Hudson *v.* N. & W. Ry. Co., 106 W. Va., 437, 146 S. E. 525, and other cases. There are a number of decisions where the concurring acts of negligence on the part of other employees are held to be of sufficient importance to the entire situation that they will be held to be causative agencies, and recovery is permitted. Louisville & N. *v.* Jacobson, 218 Ala. 384, 118 So. 565; Missouri Pac. *v.* Jones (Tex. Com. App.) 24 S. W. (2d) 32, and other cases. See, 45 U. S. C. A. 53, note 26.

We feel that the difference between those differing lines of cases is found in the determination of the likelihood of the injury occurring because of the negligence of the engineer irrespective of the concurring acts of negligence on the part of other employees. If the courts feel that the negligence of the engineer cannot be excused or minimized under the particular record, they will not permit a recovery. Whereas, if the courts feel that the concurring acts of negligence of the other employees make the situations worse and put the engineer in a position where he was less likely to extricate himself from the position where his own negligence placed him, recovery is permitted. There are many things the engineer is required to do that may not be delegated, and with respect to which he cannot lessen his responsibility; and there are other duties devolving upon him that he cannot adequately discharge without the assistance of other members of the crew, and we think the present situation is one. After the engine had entered into the first curve and had protruded itself between the engineer and the standing train, it was impracticable if not impossible for him to see the standing train until his train had traveled to a point rather close to the standing train. Obviously he had to depend upon the fireman for assistance in seeing or knowing whether the track ahead was clear, and the fireman was required to help the engineer in that respect insofar as his ability and conditions permitted. The fireman was a substitute for the engineer in this situation.

The jury in this case allowed only $3,750 recovery; a

rather insubstantial sum, one that would not have been reached but for considerable reduction because of the contributory negligent conduct of the engineer, and under the record we think it is justified. The conduct of the fireman was considered negligent, and the jury was justified in finding that if he had attended to his duties properly he could have discovered train 1229, and could have warned deceased in time to have enabled him to avoid the collision. On the other hand, they were amply justified in reducing the compensatory damages to be allowed to deceased's estate because of his culpable contribution, a procedure permitted under the act.

The judgment is affirmed.

Welch, V. C. J., and Osborn, Gibson, and Davison, JJ., concur.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 732

H. J. JENKINS,

Petitioner,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION.

PETITIONER'S REPLY BRIEF.

HARRY G. WALTNER, JR.,
SIZER & MYRES,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF.

Respondents' position in this case is technical to the extreme. In the first place, a very narrow construction is placed on the term "notified" and pyramided on top of that is another technicality, to-wit, that the petition specifically pleaded negligence of the engineer in failing to put on the emergency after being "notified" (in such narrow sense) and petitioner therefore cannot recover because respondents were negligent in failing to hear or understand the warning or notice, although the evidence established a cause of action for which recovery should be permitted. Before considering the above, we would point

out error in respondents' argument in that petitioner offered instructions on more than one charge of negligence (R. 122) specifically contending the engineer failed to have his train under control as he passed through the yard limits. The court's refusal to give this instruction cannot be charged to petitioner and therefore respondents' arguments on pages 7 and 8 are not in order.

Concerning the first condition, it is quite evident from the petition, the evidence and the instructions, as well as from the very nature of the case that the term "notify" as used in the petition and in the instructions was not used in its technical legal sense but in its general and ordinary accepted sense. The petitioner herein alleged in his petition that he "warned the said Howard Reese, the engineer of No. 630 upon which the plaintiff was riding to put on the emergency brake" (R. 6) and the respondents herein in filing their answer used the terms "warned" and "notify" as interchangeable expressions, alleging that it was petitioner's duty to "warn and notify the engineer of his said train" (R. 11) and again in the same instrument the respondents herein alleged that petitioner "negligently failed to timely notify the engineer" (R. 11), and in the next paragraph of said answer asserted petitioner negligent because "plaintiff negligently failed and omitted to warn or notify the engineer" (R. 11). Throughout instructions, both on the part of the petitioner and the respondents, the term "notice" or "notify" was used interchangeably with the words "signal" and "warned". The act is described in petitioner's Instruction No. 2 (R. 119) as "was notified" and "signal". In respondents' instructions it was referred to as follows: Instruction "C" (R. 123) "warning"; Instruction "D" (R. 123) "to warn" and "to have warned or notified"; Instruction "F" (R. 124) "to notify" and (R. 125) "to have warned or notified".

Throughout both the pleadings and the instructions given in this case, both parties to this action have used the term "notify" as interchangeable with the word "warn" or "signal" and certainly if there is any special significance to be attached to the use of a word, it cannot be carelessly used in such a manner as to entirely contradict the special significance intended. In its commonly accepted sense, notify, being the verb of the noun, notice, cannot mean anything other than to give notice and when notice is given, there is absolutely no common understanding that an assurance of understanding or comprehension is intended. Probably the most common use of the term "notify" is in everyday life attached to the obligation of a tenant to "notify" his landlord of intention to vacate premises and in such circumstances the tenant does not in any way insure the understanding of the notice which has been given to the landlord. The tenant makes the statement or declaration and the landlord fails to understand only at his own risk. The use of the word "notice" as an assurance of understanding is obsolete. Funk's Dictionary defines this to be, "intelligence by whatever means communicated; * * * an order communicated to one; * * * obsolete: (a) knowledge"; in Webster's the word "notice" will be found to mean: "Act of remarking or observing"; also will be found "Obs. a. Knowledge" and the verb "notify" is defined "to give notice of; to declare"; "remark" and "advice" are synonyms. All that can be required of a person giving notice or required to notify is that the notice or notification be couched in terms appropriate for the purpose, and the Supreme Court of Missouri in its opinion stated that this had been done (R. 137). Failure to understand is the risk which the recipient must run, the notice not being equivalent to actual knowledge. The Supreme Court of Alabama in the case of *Southern Railway Co.*

v. *Bunt*, 32 So. 507, 131 Ala. 519, in considering an instruction averred "the engineer of said engine wantonly or intentionally caused or allowed said engine to propel said car against said other car with too great force with knowledge or notice that plaintiff was between said cars, and in great danger from said car being propelled against said other car with such force" stated (So. 508, Ala. 594):

> "Wantonness in the doing of or the omission to do an act, the probable result of which will be to injure, can only be predicated upon actual knowledge of existing conditions attending the act or omission which caused the injury. Notice in such cases is not the equivalent of actual knowledge."

Again in *Osborne* v. *Alabama Steel & Wire Co.*, 135 Ala. 571, 577, that court stated, in connection with notice of defects:

> "The averment of the plea being knowledge or notice to the intestate being in the alternative, is no stronger than would be an averment of notice alone, and notice is not the equivalent of knowledge. Notice may consist merely of information as to collateral facts sufficient to incite inquiry and which an ordinarily prudent person would follow to a knowledge of the main fact."

That throughout the case "notify" was considered as but the verb of "notice" is made apparent from these two lines of the court's opinion (R. 137).

> "Plaintiff's case was submitted on the theory that the engineer failed to exercise ordinary care to stop after *notice* by plaintiff of the danger ahead. In the situation the decisive question on the demurrer to the evidence is: Is there substantial evidence that plaintiff *notified* the engineer to go into emergency?"

Throughout the instant case, the terms "notice" and "notify" are used constantly and interchangeably with

"warn", "signal" and "declare". This is particularly evident from the instructions and most certainly it is reasonable to assume that the word "notify" as appearing in one portion of the petition must be read in the light of the other averments and allegations of the petition. Likewise, throughout the instructions and the passing upon demurrers, a reasonable and ordinary and common construction must be given to these words. Petitioner respectfully suggests that at all times it was petitioner's theory, joined in by respondents that the word "notify" or "notice" was to be given no special significance and no other theory on behalf of respondents is evident at any point in the trial of the case but for the first time this narrow and unusual construction of the term and of the requirements of the law was urged at the hearing before the Supreme Court of Missouri. We urge that the word or words should be construed to be used in the light of the legal requirements made upon petitioner to prove his case. If two constructions, both of which are reasonable, can be given a word, most certainly it is fair and reasonable to construe such word in the light of the legal demands and requirements. All that can be fairly required of petitioner in the trial court or thereafter, was to establish negligent action by respondents' engineer, either by failing to apply brakes or hear or understand the warning. Failure to act after an adequate notice or warning had been given in a reasonable manner was the real charge which petitioner made against respondents, and it was well understood by those trying the case. It was immaterial why the engineer failed to act. Such being the case, these terms "notice" and "notify" should be reasonably construed as meaning warn or signal. Had there been any indication in the trial of this case of respondents' position on the question of the construction of the word "notify", petitioner herein would have asked leave to amend his petition so as to con-

form to the proof, and the trial court, following well established precedent, would have granted petitioner's request.

Parker v. *St. Louis San Francisco Ry. Co.*, 41 S. W. (2) 386 (not officially reported);

Fairgrieve v. *City of Moberly*, 39 Mo. App. 31 (not otherwise reported);

McDonald v. *St. Louis & S. F. R. Co.*, 146 S. W. 83, 165 Mo. App. 75;

Waverly Timber & Iron Co. v. *St. Louis Cooperage Co.*, 20 S. W. 566, 112 Mo. 383.

Respondents' endeavor in the reply brief to indicate that because of a technicality in pleading, this father of four children now wholly unable to support them because of injuries received in respondents' service should be deprived of a cause of action which they do not deny exists. They allege that there is a deviation between petitioner's pleading in the trial court, on the one hand, and the evidence in the case and the instructions given on the other. *Thus, endeavoring to withdraw from this Court, jurisdiction to pass upon the case as involving a Federal question.* They cannot be successful in this contention for as shown by cases cited in petitioner's original brief this Court will look behind such subterfuge and see that substantial justice is done. However, granting for the moment that there might be a variance between the charge to the jury in the instructions and the allegations of negligence in the petition, the Supreme Court should under any circumstances have remanded the case to the trial court for new trial. The failure of the Supreme Court to so remand such case fully sustains petitioner's position that the Missouri Supreme Court decided that under the law, it was essential that petitioner prove an understanding of the warning to sustain any cause of action against respondents and as the court thought the evidence in the case indicated that petitioner could not prove actual

understanding by respondents' engineer, the Missouri Supreme Court reversed the case outright. Had the Supreme Court of Missouri had the correct view as to the law, to-wit, that plaintiff had a cause of action by proving simply the giving of the notice irrespective of the understanding, *i. e.*, that respondents were liable for the engineer's negligent failure to hear or understand, the Supreme Court would have remanded the cause so as to permit a re-trial, if such were necessary, after appropriate amendment to the petition, if such were necessary. The duty of the Appellate Court to remand under such circumstances is well established in Missouri Law. *Finnegan* v. *Mo. Pac. R. Co.*, 149 S. W. 612, 244 Mo. 608. Unless the appellate court is absolutely convinced without doubt that plaintiff cannot produce facts justifying the recovery the cause should be remanded. *Hamilton* v. *Frisco*, 279 S. W. 177, 181 (Mo. App.). Even though it be not suggested that evidence can be produced establishing the right to recovery, nevertheless the cause may be remanded. *Cole* v. *Kansas City So. Ry. Co.*, 268 S. W. 886, 887 (Mo. App.). It is quite certain that upon a retrial positive evidence can be produced to sustain petitioner's cause of action. See affidavit (R. 176-179). That petitioner should be permitted a re-trial after such amendments to the petition as may be necessary, cannot be denied in view of the very recent decision of the Supreme Court of Missouri in *Jensen* v. *Wilson Township, Gentry County*, 145 (2d) S. W. 372 (Not yet officially reported). In this case a speculator in township warrants had instituted an action on the warrants to recover the face thereof with interest from the township. No right to proceed in *quantum meruit* was pleaded in the petition. The Supreme Court determined that the plaintiff had no right to recover on the warrants but added:

"This court has frequently held, when there is evidence tending to show plaintiff has rights growing out

> of the transaction involved, but has misconceived the remedy, an appellate court has discretion in the matter, and may remand the cause to permit the petition to be amended and a re-trial of the cause."

and reversed the cause with directions "to allow plaintiff to amend his petition, if he so desires, and to try the cause anew in conformity with the views herein expressed * * *."

It is inconceivable that the Supreme Court of Missouri would remand a cause giving a speculator in county warrants "a second bite at the cherry" and yet deny to petitioner, the mainstay in a family of six now physically handicapped, an opportunity to present to another jury the negligence of the respondents herein to the end that he might obtain fully and completely the remedy and relief which the Acts of Congress have granted to him. This can only be explained by admission of petitioner's fundamental contention that the Supreme Court of Missouri has entirely misconceived the basic requirements to sustain a cause of action under the Federal Employers' Liability Act, and petitioner is confident that this Court will by its decision in this case pronounce in unequivocal terms the error of the Supreme Court of Missouri in its decision herein by quashing the opinion which that court has rendered in this cause.

Respectfully submitted,

HARRY G. WALTNER, JR.,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 732.

H. J. JENKINS,
Petitioner,

vs.

JAMES M. KURN and JOHN G. LONSDALE, Trustees of the St. Louis-San Francisco Railway Company, a Corporation,
Respondents.

RESPONDENTS' BRIEF.

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Respondents.

RESPONDENTS' BRIEF.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is reported in 144 S. W. (2d) at page 76. (It is not yet reported in official reports.)

STATEMENT OF THE CASE.

Respondents deem it necessary to make a statement of the case for the reasons that the statement under the heading (A) in the Petition For Writ of Certiorari adopted by petitioner in his brief is insufficient in the particulars to which we shall refer, to give the court a full understanding of the facts.

In view of the issues as made by the pleadings and presented to the Supreme Court of Missouri, certain facts upon which petitioner lays emphasis are, in the opinion of respondents, immaterial.

The point of collision was on a reverse curve. Petitioner lays emphasis upon the fact that shortly after the train, of which he was fireman, passed the Walnut River Bridge, and when the train was approximately fourteen poles, or one-half mile, from the point of collision, the engineer might, for a brief interval, have seen the caboose of the standing train ahead. The witness V. A. Sinclair testified that from an observation subsequently made by him, one in the position of the engineer could for a distance of "only a few feet" have seen the track for a distance of approximately 175 or 200 feet immediately south of the Santa Fe railroad crossing (R. 158). That fact, however, is immaterial because nowhere in the petition was it alleged that the engineer could have seen the standing train and no negligence was alleged because of his failure to see the train.

One specific allegation of negligence in petitioner's petition was, in substance, that the engineer failed to keep a constant lookout for a special train, which he knew was ahead of him, and failed to have his train under control (R. 11), but it was not charged that he could at any time have seen this train. On the contrary, petitioner affirmatively testified that the engineer could not have seen it (R. 35, 68).

Petitioner has not, we believe, either in his petition or brief clearly stated the issue submitted to the jury in the trial court and to the Supreme Court of Missouri on appeal.

In his petition petitioner alleged some five specific allegations of negligence with which respondents were charged (R. 11, 12). When the case was submitted to the jury all of these, save one, were abandoned. The case was submit-

ted to the jury solely on the following specific allegation of negligence:

> "(d) In that said engineer in charge of said train No. 630 was further negligent in that after he was notified by plaintiff that the extra was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced plaintiff to jump from said train in order to save his life, or some bodily harm" (R. 11, 12, 167, 168).

Petitioner states that the Supreme Court of Missouri reversed the judgment "on the theory that petitioner's failure to make the engineer of respondents' train understand a warning of danger on the track ahead barred any recovery at all for the injuries resulting from respondent engineer's negligence." The Supreme Court in its opinion correctly states the issue, "Plaintiff's case was submitted on the theory that the engineer failed to exercise ordinary care to stop after notice by plaintiff of the danger ahead" (R. 191). Upon this issue it held, "The burden was on plaintiff to establish that he notified the engineer to go into emergency. He did not so notify him unless the engineer understood what was said, and there is not a scintilla of evidence that the engineer understood what plaintiff said" (R. 191). And, "Every word of plaintiff's evidence, on the point, tends to show that the engineer did not understand what plaintiff said" (R. 192).

Petitioner states that "failure of the fireman to give an adequate warning, or to give any warning to the engineer can, under the decisions of this court, only constitute contributory negligence, reducing rather than barring a recovery" (Petition 5). To this respondents cannot agree. We concede that if the evidence warranted the finding that the engineer was notified, that is to say, if he heard and

understood petitioner's warning, that the case was properly submitted to the jury and that the contributory negligence of petitioner would not bar his right of recovery.

Our position is that no negligence on the part of the engineer was shown, and absent that showing, there can be no recovery and the question of whether petitioner was guilty of contributory negligence becomes immaterial.

The engineer was charged only with failing to act after notice. He received no notice and consequently was guilty of no negligence.

Petitioner testified that after passing the Walnut River Bridge the engineer being on the outside of the curve could not see the standing train, and because of his inability to see, it then became petitioner's duty to keep the lookout (R. 68). He testified that when 10 to 15 car-lengths from the caboose, (he estimated 40 feet to the car (R. 70)) he saw the caboose of the standing train; that he "hollered" to the engineer to put the brake valve in emergency (R. 35, 71); that the engineer looked around—"He didn't do nothing; he looked like he thought I was joking with him or something" (R. 36). The engineer looked toward petitioner but did nothing and said nothing to indicate he understood what petitioner had said (R. 71, 72). The petitioner immediately left his seat box, the train having then moved about a car length or more since he called to the engineer, and went over to the engineer's side (R. 72). Although the engineer's action was clearly indicative of the fact that he had not understood what petitioner said, and although petitioner could see that the engineer had not applied the brakes and was doing nothing towards stopping the train, petitioner says he did nothing further toward warning the engineer (R. 72, 73, 74). When the engine was within two or three car lengths of the standing caboose, petitioner jumped, still without having said anything to the engineer.

It was about the time he jumped that the brakes were set in emergency and that was the first time when, as petitioner testified, the engineer could have seen the standing caboose (R. 74).

Petitioner in his statement says that respondents' witness testified that petitioner gave the engineer violent stop signals with his hands as he crossed the deck to jump (Petition 3). Petitioner testified that he did not signal with his hand; that aside from hollering to the engineer, "that is all I did" (R. 75). Respondents' witness Felton testified that when the engine was three or four car lengths from the caboose he saw petitioner leaving his seat; that "He run straight across the deck giving this stop signs with his hands, like that (indicating) and jumped out of the deck" (R. 118). Petitioner testified the engine was within two or three car lengths of the caboose when he jumped (R. 74). There is not a scintilla of evidence to warrant the finding that if, as petitioner denies but as Felton testified, petitioner then gave the engineer a signal by hand, the engineer could then have stopped the train before the collision. In addition to this, according to the testimony of Felton, petitioner jumped immediately after giving the signal and did not wait for any action on the part of the engineer, although petitioner testified that the brakes were applied about the time he jumped. The resulting collision is cogent proof that the signal by hand, if then given, could not have averted the collision.

SUMMARY OF ARGUMENT.

A. The sole issue in this case is whether there is any substantial evidence that the petitioner actually notified respondents' engineer of the peril, in time for the engineer to have thereafter stopped the train:

1. The sole allegation of negligence submitted to the jury was the failure of respondents' engineer to stop the train after being **notified** of the peril by the petitioner. The petitioner did not request the submission of any other allegations of negligence, and, therefore, all other allegations of negligence were and are now abandoned.

2. The petitioner was bound in the Supreme Court of Missouri and is bound in this Court by his trial theory.

3. The respondents did not, by reason of requesting Instruction "C", join with petitioner in submitting the case upon the erroneous theory that it was the duty of respondents' engineer to exercise due care to hear and understand petitioner's warning, because the trial court had refused defendants' peremptory instruction for a directed verdict; therefore, the respondents did not waive their right to now reassert that petitioner's theory is erroneous.

4. The question of petitioner's contributory negligence is not an issue in this case because there was no evidence of any negligence on the part of respondents under the pleadings and proof.

B. The burden rested upon petitioner to prove that he actually **notified** respondents' engineer of the danger. There is not even a scintilla of evidence in this case that petitioner **actually notified** respondents' engineer; that is, that respondents' engineer understood petitioner's warning and became aware of the peril in time to have stopped the train.

ARGUMENT.

Petitioner having here presented issues neither made by the pleadings, submitted to the jury, presented to nor decided by the Supreme Court of Missouri, it is important that we clearly understand the issues as presented by the record.

Where specific negligence is charged recovery may be had only upon proof of one or more of the acts of negligence so alleged.

Zasemowich v. American Mfg. Co. (Mo. Sup.), 213 S. W. 799, 802;
Yall v. Gillham, 187 Mo. 393, 408, 86 S. W. 125;
Gilliland v. Bondurant, 332 Mo. 881, 59 S. W. (2d) 679, 685;
Allen West Commission Co. v. Richter, 286 Mo. 691, 228 S. W. 827, 832.

Where two or more specific allegations of negligence are alleged and, as in the instant case, plaintiff requests that only one of these be submitted to the jury, the others are treated as having been abandoned and the case is thereafter considered as though the act of negligence submitted were the only one alleged.

Nahorski v. St. Louis E. T. R. Co., 310 Mo. 227, 274 S. W. 1025;
Crossno v. Terminal R. Assn. of St. Louis, 328 Mo. 826, 41 S. W. (2d) 796, 800;
Wallace v. Burkhart Mfg. Co., 319 Mo. 52, 3 S. W. (2d) 387, 390;
Denkman v. Prudential F. Co. (Mo. Sup.), 289 S. W. 591, 596.

Petitioner was bound in the Supreme Court of Missouri and is bound in this Court by his trial theory.

Degonia v. St. Louis, I. M. & S. R. Co., 224 Mo. 564, 588, 123 S. W. 807;

Duffley v. McCaskey (Mo. Sup.), 134 S. W. (2d) 62, 65;
O'Hara v. Laclede G. L. Co., 244 Mo. 395, 403, 148 S. W. 884;
Pinnell v. St. Louis-S. F. R. Co. (Mo. Sup.), 263 S. W. 182, 186;
Rath v. Knight (Mo. Sup.), 55 S. W. (2d) 682, 684.

This Court in Virginian R. Co. v. Mullens, 271 U. S. 220, 227, 228, said:

> "After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

The charge of negligence as laid in petitioner's petition and as submitted to the jury was that the engineer was negligent "**in that after he was notified by plaintiff** that the extra was standing on said track near said crossing, he failed to immediately apply the air in emergency, * * * " (R. 11, 12, 167, 168).

No negligence was predicated upon the failure of the engineer to be on the lookout for or in failing to see or hear a warning from petitioner as to the presence of the standing train ahead. Respondents are charged only with the negligent failure of the engineer to act "after he was notified" by petitioner.

The issue is not, as stated by petitioner, that the engineer should have anticipated the probability of a warning or signal from petitioner, nor that it was for the jury to say whether the engineer, in the exercise of due care, should have heard petitioner's warning. The issue is whether or not the engineer was notified. Did petitioner bring home to the engineer actual knowledge of the danger ahead?

Under the allegations of the petition the burden rested upon petitioner to prove notice, that is, actual knowledge.

To allege that one is notified of a fact is comparable to saying that knowledge of the fact was actually imparted and made known.

In Vinton v. Builders' and Manufacturers' Assn., 109 Ind. 351, 9 N. E. 177, 178, it was held:

> "The word 'notify' used in such section, is a compound word of Latin derivation, and its primary and literal meaning is 'to make known'."

In Fast v. Scruggs, 164 Oklahoma 196, 23 Pac. 2d 383, 386, the Court said:

> "Generally, the word 'notify' is defined as meaning to give notice to; to inform by words or writing in person or by message, or by any signs which are understood; to make known. 49 C. J. 570."
>
> "To notify one of a fact is to make it known to him, to inform him by notice. Huntington v. City of Calais, 105 Me. 144, 73 Atl. 829."

In Crosby v. Wells, 73 N. J. Law 790, 67 Atl. 295, 302, the Court defined the word "knowledge" as "the receiving of a mental impression, the state of being aware."

The case of Johnston v. Southern Ry. Co., 236 Ala. 184, 181 So. 253, 255, was one wherein the plaintiff sought to recover for the death of the driver of an automobile who drove his automobile into the side of a moving train. Negligence under the last clear chance doctrine was alleged upon the ground that the death was not caused by the original impact but by the fact that the deceased and his automobile were dragged for some distance and that the enginemen failed to stop the train after knowledge of the peril. In discussing the question of the quantum of proof necessary to establish knowledge, the Court said:

> " 'Knowledge of peril,' as an essential predicate for guilt of subsequent negligence, means actual knowledge, and not that imputed knowledge which is based

upon information merely of facts which, if followed up, would result in actual knowledge (Citing cases)."

The foregoing holding has peculiar application to the instant case because here negligence is not predicated upon failure to be on the look-out or watch for a warning, but upon failure to act "after notice."

Respondents concede that if the record warrants the finding that the engineer promptly heard and understood what petitioner said to him, and thereby knew of the danger ahead, then a question of fact for the jury was presented.

We contend, however, that under the record the Supreme Court of Missouri correctly held, "There is not even a scintilla of evidence that the engineer understood what plaintiff said" and, therefore, no case for the jury was made and the reversal of the judgment was warranted.

Instruction No. 2 given by the trial court on behalf of petitioner provides that if the jury found that "such notice was given in time for the engineer to make such emergency stop, then it was his duty to make such stop, if you find that the engineer understood the signal **or in the exercise of ordinary care could have so understood the signal**" (R. 167, 168). Respondents in the Supreme Court of Missouri assigned error in the giving of such instruction upon the ground that because of the inclusion of the latter clause above quoted, the instruction was broader than the pleading and thus erroneous.

Petitioner now asserts that respondents by their requested Instruction "C" (R. 174) joined with him in submitting the case upon the theory that it was the duty of the engineer to have heard and understood the warning if he could have done so by the exercise of ordinary care. In this, petitioner is in error. The well settled rule as announced by the decisions of the Supreme Court of Mis-

souri is that, where after the refusal of the trial court to adopt the defendant's theory as evidenced by the refusal to give the peremptory instruction for a directed verdict, the defendant may frame its instructions upon the theory adopted by the trial court without waiving its right to later assert that such theory is erroneous.

Everhart v. Bryson, 244 Mo. 507, 516, 517, 149 S. W. 307, 309;
Davis v. Chicago & E. I. Ry. Co., 338 Mo. 1248, 94 S. W. 2d 370, 373;
State ex rel. American School of Osteopathy v. Daues, 322 Mo. 991, 18 S. W. 2d 487, 490.

This point was urged by petitioner in the Supreme Court of Missouri but under the foregoing rule the court held in effect, at least, that by requesting their Instruction "C" respondents were not bound by petitioner's erroneous theory of his right of recovery under the issues made by the pleadings.

Petitioner lays much emphasis upon the fact that the engineer was in primary control of the movement of the train, and that it was his duty to have it under control. This we concede. The evidence, however, shows conclusively that the engineer had the train under control. Petitioner's very right to recover in this case, as submitted, must be upon the theory that the engineer did have it under control, because he charges, in effect, that if the engineer had acted upon notice he could and would have stopped the train before the collision occurred. Petitioner affirmatively testified that the train was running at approximately six miles per hour and that if the engineer had applied the brakes in emergency when he called to him, he could have stopped the train (R. 34, 38, 70).

Petitioner asserts that the engineer had the absolute duty to know that the track was clear and that the negligence

of petitioner was but contributory to that of the engineer. The statement is made by petitioner that the engineer could have seen the standing train when his engine was about one-half mile from the crossing. We assume petitioner has reference to the testimony of witness Sinclair, who testified that after the accident, from observations then made by him from the engineer's position in the cab of the engine at a point just east of the Walnut River Bridge, he could for the distance of only a few feet see the track approximately 175 or 200 feet south of the Santa Fe tracks (R. 158). While it was charged in the petition, in one specific allegation of negligence, later abandoned, that the engineer failed to keep a lookout, there is no allegation that the engineer could at any time have seen the standing train or that he was negligent in failing to see it. Petitioner testified that the engineer could not see the standing train because of the curve, and other obstructions, and for that reason it became his, petitioner's duty to keep the lookout and notify the engineer (R. 35, 68).

Petitioner says that he "did perform an act, warning, signalling or notifying respondents' engineer of the danger. If the doing of that act was not quite sufficient or if it were done in a manner not quite effective, all that petitioner can be guilty of is failing to perform to perfection a duty which is required from a very general rule and a duty in respect to which there is no measuring stick by which its adequacy or sufficiency can be judged." (Brief p. 25). The foregoing is a typical illustration of the fact that petitioner now seeks, as he did in the Supreme Court of Missouri, to recover upon a theory which he himself did not present by his pleading. There is in this connection a very definite measuring stick, one of petitioner's own creation—namely, notice to the engineer; not whether he gave a warning or performed some act which the engineer, in the exercise of due care should have understood, **but that**

he brought home to the engineer actual knowledge of the fact. The Supreme Court of Missouri correctly held that there was no proof of notice to the engineer. It did not hold that petitioner was guilty of contributory negligence and as a result thereof could not recover. The question of petitioner's contributory negligence was not involved.

The burden of proof rested upon petitioner to prove the negligence as alleged, namely, that he notified the engineer; that is, that the engineer heard and understood what he said. Proof of this fact cannot be left to mere speculation, guesswork or conjecture.

Southern R. Co. v. Walters, 284 U. S. 190, 194;
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 354;
Northwestern Pacific R. Co. v. Bobo, Administratrix, 290 U. S. 499, 502;
Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455;
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478;
Evans v. Massman Const. Co., 343 Mo. 632, 122 S. W. 2d 924, 932;
Markley v. Kansas City Southern Ry. Co., 343 Mo. 632, 90 S. W. 2d 409, 413;
Grange v. Chicago & E. I. Ry. Co., 334 Mo. 1040, 69 S. W. 2d 955, 961;
Ducoulombier v. Thompson, 343 Mo. 991, 124 S. W. 2d 1105, 1110.

It is not sufficient that the proof show that petitioner "shouted" or spoke in a tone which the engineer should have heard. The engineer is not charged with failing to hear, but with failure to act after notice.

In support of his contention petitioner cites Gillis v. Atl. C. L. R. Co., 175 S. C. 223, 179 S. E. 62; Washington and Old Dominion R. Co. v. McPherson, 26 Fed. 2d 989, and Pennsylvania v. Shelley, 221 Federal 901. None of these cases is in point.

In the Gillis case, while the opinion does not refer to the specific negligence charged, it was shown that plaintiff gave the engineer a stop signal, and that the engineer understood that signal because the brakes were applied; but because he did not have the train under control he failed to stop the train and injured plaintiff.

In the Shelley case the negligence of the engineer was clearly shown and, having been shown, the Court held that the negligence of the plaintiff himself was not the sole proximate cause.

In the McPherson case the negligence relied upon was the failure of the motorman to keep a constant, vigilant lookout for signals and in failing to see a danger signal which was displayed and which the evidence showed he would have seen in the exercise of due care; while in the instant case the negligence alleged is not the failure to be on the lookout for the signal, but the failure to act after notice.

Petitioner refers to the fact that in the Gillis and McPherson cases certiorari was denied by this Court. This Court has frequently held that the denial of a writ of certiorari imports no expression of opinion on the merits of the case and is in no case equivalent to an affirmance of the decree that is sought to be reviewed.

> Atl. Coast L. R. Co. v. Powe, 283 U. S. 401, 403;
> United States v. Carver, et al, 260 U. S. 482, 490;
> Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 258.

The cases of Rocco v. Lehigh Valley R. Co., 288 U. S. 275; Union Pacific R. Co. v. Hadley, 246 U. S. 330 and Frese v. Chicago, B. & Q. R. Co., 263 U. S. 1, relied upon by petitioner are not in point because each involves the question of whether the negligence of the plaintiff was the sole proximate cause or merely the contributing cause. In

this case the question is, Was the engineer guilty of negligence as charged? If he was not, as we contend, then no liability may be imposed upon respondents.

Petitioner says that it was wholly unreasonable to require that the failure to give a warning in a particular way should bar petitioner's action. The Supreme Court of Missouri did not hold that petitioner was required to give a warning in a particular manner. It merely held that petitioner founded his cause of action upon a charge that the engineer was negligent in failing to act after he was notified of the danger by petitioner, and that petitioner had wholly failed to prove this fact.

In his statement of the case petitioner says "Respondent's witness testified that petitioner gave the engineer violent stop signals with his hands as he crossed the deck to jump (R. 118)". (Petition 3). This statement requires some further explanation of the facts developed in that connection. The witness Felton, to whom petitioner refers, testified that until the engine was within three or four car lengths of the caboose petitioner had his head turned to the left toward the fair grounds; that he was not looking ahead (R. 116, 117); that when the engine was three or four car lengths from the caboose petitioner left his seat box, ran straight across the deck "giving this stop signs with his hands, like that (indicating), and jumped out of the deck" (R. 118). Petitioner specifically denies that he gave any signal with his hands; he says that calling to the engineer was all that he did (R. 75). Under the rule of decision in Missouri, which will be respected by this court, a party cannot recover upon the testimony of his adversary when it is in conflict with his own testimony.

Elkin v. St. Louis Pub. Service Co., 335 Mo. 951, 74 S. W. 2d 600, 603;

State ex rel Weddle v. Trimble, et al, 331 Mo. 1, 52 S. W. 2d 864, 867.

Aside from that question, even if petitioner gave the engineer a hand signal, as testified to by Felton, thus notifying the engineer of the danger ahead, it gains petitioner nothing for the reason that Felton testified that the engine was then within three or four car lengths of the caboose and that immediately upon giving the signal, petitioner, without waiting for the engineer to act, jumped. There is no evidence that within that distance the train could have been stopped. Therefore, petitioner would not have been saved from injury had the engineer then set the brakes in emergency, and consequently such failure could not have been the proximate cause. In addition to this petitioner testified that about the time he jumped the engineer set the brakes in emergency (R. 76), and it was at that time that the engineer himself could have first seen and probably did see the caboose (R. 74, 76). The conduct of the engineer, as petitioner himself relates, in the face of certain danger to himself, demonstrates beyond the peradventure of a doubt that, although he may have looked toward petitioner, he did not hear, nor understand, what petitioner said. When petitioner called to him the engine was ten to fourteen car lengths from the caboose. Aside from looking toward petitioner the engineer did nothing. Within the distance of one car length petitioner got off of his seat box, walked over behind the engineer, saw that the engineer had not applied the brakes, and yet, according to his own statement, he did or said nothing more (R. 72, 74). The brakes were not applied until the engineer himself could see the caboose and they were applied as soon as the engineer could see it.

Under these facts, falling from the lips of the petitioner himself, there is no such inference as would warrant the jury in finding as a fact either that the engineer heard and understood petitioner's warning or knew of the peril. As said by the Supreme Court of Missouri, to impute such

knowledge to this engineer necessarily implies that "there can be no explanation for his failure to act, except that he was determined on suicide"? The presumption is to the contrary.

Petitioner, as an appendix to his brief, prints the opinion of the Supreme Court of Oklahoma in Kurn, et al, v. Reese, Administratrix, a suit for the death of the engineer. The opinion of the Supreme Court of Oklahoma in that case has not become final. It is, as we write this brief, pending upon appellant's motion for rehearing. The instant case must be decided upon its record, upon the testimony for which the petitioner himself vouches, and not upon the record made or the decision announced, but not yet final, in the Reese case.

It is respectfully submitted that the decision of the Supreme Court of Missouri should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 732.—October Term, 1940.

H. J. Jenkins, Petitioner, vs. James M. Kurn, et al., Respondents. } On Writ of Certiorari to the Supreme Court for the State of Missouri.

[May 5, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

When the interstate train on which he was fireman emerged from a curve on the outskirts of Winfield, Kansas, petitioner sighted a train standing not more than six hundred feet ahead on the same track. He shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked at him but did nothing to arrest the movement of the train. Petitioner jumped from his seat, crossed the cab, and stood behind the engineer for a brief time but said nothing. When the engine was but two or three car lengths from the standing train, the engineer applied the brakes. At that moment petitioner leaped from the engine and landed in some rocks along the track. He sustained serious injuries and to recover damages brought the instant action under the Federal Employers' Liability Act (45 U. S. C. §§51-59) against respondents in a Missouri circuit court.

The complaint contained five counts charging negligence, but only the fourth was submitted to the jury. Count four alleged: "... that said engineer ... was further negligent in that after he was notified by [petitioner] that the [train] was standing on said track near said crossing, he failed to immediately apply the air in the emergency, to stop said train, which negligence created a dilemma of imminent peril, which forced [petitioner] to jump from said train in order to save his life, or some bodily harm."

The case was tried before a jury which returned a verdict of $12,000. From judgment in that amount entered for petitioner, respondents appealed, assigning various errors. Confining its attention to one, the Supreme Court of Missouri held that the circuit court should have granted respondents' motion for a directed verdict. It reversed the judgment but did not remand the cause for a new trial. 144 S. W. (2d) 76. We granted certiorari on March 10, 1941. 312 U. S. —.

It is conceded that the action was properly brought under the Federal Employers' Liability Act. The single question is whether the trial court correctly refused to direct a verdict for respondents.

In explanation of its conclusion that the trial court erred, the Supreme Court of Missouri observed: "The burden was on [petitioner] to establish that he notified the engineer to go into emergency. He did not so notify him unless the engineer understood what was said, and there is not even a scintilla of evidence that the engineer understood what [petitioner] said." In other words, not only must petitioner prove that he moved to warn the engineer of the impending danger, but he must prove the engineer's subjective comprehension and correct interpretation of that warning, verbal or otherwise. We cannot agree.

To be sure petitioner was required by the allegations of his complaint to prove that he acted promptly and reasonably to awaken the engineer to the danger ahead. Since the only count submitted to the jury charged that the engineer was negligent in failing to apply the brakes after notice of the train in front, petitioner was compelled also to prove that the notice was communicated to the engineer. But to establish the fact of communication petitioner had only to prove that the engineer should have comprehended the warning under the circumstances disclosed. He was not obligated to go further and produce evidence of the subjective reactions in the engineer's mind. The right of action conferred by § 51 is not to be burdened with impossible conditions.

There was evidence from which the jury could have concluded that if not subject to any physical disability the engineer would have comprehended petitioner's monition and understood that peril was imminent. Petitioner testified without contradiction that he "hollered" his warning loudly; that only a narrow space separated his perch from the engineer's seat; that the engineer's hearing was "all right"; that petitioner and the engineer could and did carry on "normal conversations" while the train was operating; and that there was comparatively little noise in the cab from the train.

Judged by the test outlined above, that evidence was ample to warrant submission of the issue to the jury. Since other questions which our decision does not touch were presented to the Supreme Court of Missouri, the judgment is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.